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TABLE OF CITATIONS

In The
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-167)

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees

(No. 74-165)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE NEW HAVEN TRUSTEE, AS APPELLEE

This brief is submitted on behalf of Appellee Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). Since July, 1961, the New Haven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, United States District Court for the District of Connecticut, No. 30226. However, since December 31, 1968, New Haven's former railroad has

been operated by Penn Central Transportation Company ("Penn Central"), pursuant to the inclusion approved by this Court in *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The Court (399 U.S. at 483-89) declared that the New Haven Reorganization Court (Anderson, J.) was correct in concluding that a plan which allowed payment of a portion of the purchase price for New Haven's assets in the form of common stock of Penn Central valued at a price of $87.50 per share was not fair and equitable; stated that Judge Anderson's solution to this problem, a provision whereby Penn Central would be required to "underwrite" the $87.50 value of the 950,000 shares, was conceptually sound but had become "unrealistic" by virtue of Penn Central having filed for reorganization some eight days prior to the Court's decision; and accordingly remanded the case to the Interstate Commerce Commission ("ICC") and the appropriate federal courts for further proceedings in accordance with its opinion. The New Haven Trustee takes the position that the only reasonable interpretation of the Court's opinion is that the New Haven estate is to be treated as having a secured claim as to the full unpaid amount of the purchase price of the assets conveyed on December 31, 1968, secured by such assets. The issues on the remand have yet to be adjudicated.[1] The New Haven Trustee is presently owed $123,809,404 by Penn Central, exclusive of interest, out of a total purchase price, approved by this Court in the *New Haven Inclusion Cases*, of $174,635,899. The New Haven Trustee's standing in this case is predicated upon his unpaid secured claim for the balance of the purchase price for the assets conveyed to Penn Central on December 31, 1968.

The New Haven Trustee, together with other appellees here, prevailed in the court below as to certain

[1]See New Haven Trustee's Brief as Cross-Appellant (in No. 74-166), dated August 28, 1974, at 81-82, n. 76, for a discussion of the procedural history of the remand issue in the ICC and the federal courts.

of the constitutional questions presented for decision.[2] The New Haven Trustee's present brief as Appellee is in support of those portions of the order below which enjoined the United States and USRA from enforcing certain provisions of the Regional Rail Reorganization Act of 1973.[3]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These cases involve the following constitutional provisions and statutes:

United States Constitution:

Article I, Section 8, Clauses 3 (Commerce Clause) and 4 (Bankruptcy Clause)
Article I, Section 9, Clause 7
Fifth Amendment (Due Process and Takings Clauses)

Pertinent extracts of the foregoing provisions are set forth in Appellants' briefs, except for Article I, Section 9, Clause 7, which reads in pertinent part as follows:

[2]The appellants and their briefs to which this is addressed are as follows:

1. United States Railway Association ("USRA"), Appellant in No. 74-167, brief dated August 28, 1974;

2. United States of America, *et al.* ("United States"), Appellants in No. 74-168 (includes appeals filed by the United States, the ICC, the Chairman of the ICC, and the Secretary of the Treasury), brief dated August, 1974; and

3. Robert W. Blanchette, Richard C. Bond and John H. McArthur, as Trustees of Penn Central ("Penn Central Trustees"), Appellants in No. 74-165, brief dated August 23, 1974.

This brief also addresses, where appropriate, the separate contentions of U.S. Representative Brock Adams (on behalf of 36 Congressmen) contained in his *Amicus Curiae* Brief and Motion for Leave to file *Amicus Curiae* Brief, dated August, 1974. The New Haven Trustee consented to the filing of such Brief.

[3]The New Haven Trustee's cross-appeal (No. 74-166) is from so much of the order below as denied in part his claim for injunctive relief against enforcement of certain provisions of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq.*, on the ground that such provisions were repugnant to the Constitution.

"No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law. . . ."

Statutes of the United States:

Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§701 *et seq.* (JA 491-531[4]) (hereinafter cited as "RRRA").

Section 77 of the Bankruptcy Act, 11 U.S.C. §205 (Appendix to New Haven Trustee's brief as Cross-Appellant in No. 74-166, at A1-A12).

Tucker Act, 28 U.S.C. §1491 (Appendix to brief of Penn Central Trustees, at 1a-2a).

In addition to the foregoing statutory provisions, pertinent extracts of which are found in the Joint Appendix or in the appendices to the briefs of Appellants, the following additional statutory provisions are necessarily involved in the decision of these cases to the extent that the Tucker Act, 28 U.S.C. §1491, is relied upon by Appellants:

31 U.S.C. §724a reads, in pertinent part, as follows:

"§724a. Appropriations for payment of judgments and compromise settlements against the United States

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of

[4]"JA" followed by a page reference refers to the Joint Appendix of Appellants and Appellees in these cases lodged in this Court. A Joint Documentary Submission ("J.D.S.") has also been so lodged, and documents therein are referred to by "J.D.S." followed by the number of the document.

sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law. . . ."

28 U.S.C. §2517 reads as follows:

"§2517. Payment of judgments

"(a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

"(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy."

28 U.S.C. §2518 reads as follows:

"§2518. Certification of judgments for appropriation

"The Secretary of the Treasury shall certify to Congress for appropriation only such judgments of the Court of Claims as are not to be reviewed or are entered upon mandate of the Supreme Court."

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is there an adequate remedy at law under the Tucker Act (28 U.S.C. §1491) for an otherwise uncompensated taking for public use of Penn Central's rail properties and the New Haven Trustee's liens thereon such that the constitutional issues posed by the RRRA need not be reached?

2. If there is no such adequate remedy at law, was the court below correct in enjoining enforcement of the RRRA on the ground that, in failing to provide just compensation for an interim taking for use, the RRRA was repugnant to the Fifth Amendment to the Constitution?

COUNTER-STATEMENT OF THE CASE

Penn Central filed for reorganization under §77 of the Bankruptcy Act on June 21, 1970. The early stages of Penn Central's §77 proceedings were devoted to an effort by the Penn Central Trustees to identify the problems which had to be overcome in order to achieve an earnings-based reorganization. The initial cash crisis was temporarily alleviated by orders of the Penn Central Reorganization Court permitting deferrals of interest on debt (other than equipment debt), of most leased line rentals and of real estate taxes.[5] In addition, acting pursuant to §77(c)(3), the Penn Central Reorganization Court approved issuance of $100 million of Trustees' Certificates which, in order to be marketable, required the guarantee of the United States. See *In re Penn Central Transportation Co. (Order No. 124)*, 325 F. Supp. 302 (E.D. Pa. 1971).

A series of ten reports of the Penn Central Trustees[6] disclose the history of the Trustees' efforts to achieve a private earnings–based reorganization of Penn Central. The Trustees began by asserting that Penn Central could be reorganized if certain conditions. not within their control, were met.[7] Sub-

[5]Through December 31, 1973, the following amounts had been deferred: interest, $104 million; leased line rentals, $101 million; taxes, $241 million. Stipulation as to Factual Matters (printed at JA 317-24; hereinafter cited as "Stip. Fact"), ¶¶12, 13, 14. The total of such deferrals was $446 million as of December 31, 1973, and represents a priority administration claim. This total does not include $57 million of interest on $300 million of notes secured by pledge of Penn Central's stock interest in Pennsylvania Co., a non-rail subsidiary. If the interest on the notes secured by the Pennsylvania Co. stock is included, deferrals amounted to $503 million as of December 31, 1973.

[6]The earliest report is dated February 10, 1971, and the latest April 3, 1974; they are reproduced in J.D.S. 1 through 10.

[7]The New Haven Trustee on March 10, 1972 advised the Penn Central Reorganization Court that in his opinion the Penn Central Trustees' predictions as to reorganizability of Penn Central on an earnings basis were unduly optimistic. See J.D.S. 11.

sequent reports spelled out a lack of success in achieving these conditions. Finally, in their January 1, 1973 and February 1, 1973 reports, the Trustees acknowledged that reorganization would not be possible without a *government grant* (not merely financial assistance by way of loans or guarantee of borrowings) on the order of $600 to $800 million.

There followed an attempt by the Trustees to put into effect certain crew-consist changes (which had been the subject of exhaustive, but unproductive, proceedings under the Railway Labor Act), that resulted in a strike by the United Transportation Union on February 8, 1973. Congress responded by enacting Senate Joint Resolution No. 59, which imposed a 90-day moratorium on both the work-rule changes and the strike.[8]

Shortly thereafter, acting *sua sponte*, the Penn Central Reorganization Court entered an opinion and order regarding the status of reorganization efforts. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973). Judge Fullam on March 6, 1973 concluded as follows:

> "Whether the constitutional limit [of erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Un-

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[8]Public Law 93-5, 87 Stat. 5 (February 9, 1973). Following that action by Congress, the Trustees never again attempted to effectuate the work-rule changes. For a discussion of the factual and legal background of the crew-consist dispute prior to Senate Joint Resolution No. 59, see *In re Penn Central Transportation Co. (Opinion in Support of Order No. 830 re Crew—Consist Controversy)*, 347 F. Supp. 1356 (E.D. Pa. 1972). Contrary to the inference conveyed by USRA's brief (at 31), Senate Joint Resolution No. 59 was in response to the emergency created by the strike, and was not primarily a response to the Penn Central Trustees' Reports dated January 1 and February 1, 1973.

der any view of the matter, *it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.*

* * *

"The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a *reasonable time* in order to permit rehabilitation of the enterprise. Whenever it appears that there is *no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.*

* * *

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears *highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.*" *Id.* at 1344-46 (emphasis added).[9]

There then followed proceedings before the ICC in August, 1973 upon proposed plans of reorganization of Penn Central filed by the New Haven Trustee in June, 1973, and subsequently by the Penn Central Trustees and Penn Central Company. The ICC's Report dated September 28, 1973 rejected on various grounds all plans submitted for the reorganization of Penn Central,[10] and declined to certify to the Reorganization Court any plan of reorganization under §77(d), essentially adopting the position urged by the United States that reorganization of Penn Central had to await a "solution" for the Northeast that would, in turn, require Congressional action.

On October 9, 1973, the New Haven Trustee filed a motion to dismiss Penn Central's §77 proceedings

[9]Thus, by the time this appeal has been heard, Penn Central will have been "permitted to operate on its present basis" for more than one year beyond the date of "highly doubtful" constitutionality.

[10]The ICC's Report dated September 28, 1973 is J.D.S. 54. Extracts from the testimony in the ICC proceedings are set forth in J.D.S. 38-53.

pursuant to §77(g), and sought a liquidating receivership, on the ground, *inter alia*, that the point of unconstitutional erosion of the Penn Central estate had commenced not later than January 1, 1973,[11] the date of the Penn Central Trustees' Report (J.D.S. 8).

On January 2, 1974, the RRRA was signed into law by the President.[12]

On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central. Named as defendants were the United States, USRA, and Secretary of Transportation Brinegar (herein sometimes referred to collectively as the "Governmental Defendants"). The action was filed in the United States District Court for the District of Columbia, and was subsequently transferred, by consent, to the Eastern District of Pennsylvania, where other cases concerning the constitutionality of the RRRA were pending. Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all these cases. The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional by virtue of the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to "un-

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[11]J.D.S. 13. As is noted in greater detail in Part II-A of the Argument, this Motion and a related petition seeking an equity receivership have not been decided. No hearing was held on the §77(g) Motion until May 6, 1974. A previously filed petition of the New Haven Trustee, seeking, *inter alia*, the fixing of a date for termination of operations (J.D.S. 12) filed March 16, 1973, was never set down for hearing. By Order No. 1648, further proceedings have been conducted on the §77(g) Motion and related petitions, including a further hearing on September 19, 1974.

[12]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references to the RRRA are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

derwrite" any constitutional deficiency in the RRRA. After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his complaint. The Governmental Defendants and the Penn Central Trustees each then filed counter-motions for summary judgment.[13]

The issue below was whether an injunction should issue restraining the enforcement of various sections of the RRRA on grounds of repugnance to the Constitution. The court granted, in part, the motion of the New Haven Trustee and other plaintiffs for summary judgment, and issued an order dated June 25, 1974 ("Order"; JA 82-83) which enjoined USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court enjoined all parties "from enforcing, or taking any action to implement, so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[14] Finally, the court entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final sys-

[13]The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings (identical to JA 197-99) and a Stipulation as to Factual Matters (JA 317-23; hereinafter cited at "Stip. Fact-").

[14]This portion of the Order was entered *sua sponte*, none of the plaintiffs having sought this relief.

tem plan contemplated by the RRRA, and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment to the Constitution insofar as it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82-83). The court also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution for the reason that the RRRA is not uniform geographically throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

Insofar as the Order denied in part, on grounds of alleged prematurity, the injunction sought by the New Haven Trustee against the implementation of the compulsory conveyance provisions of the RRRA as constituting an uncompensated taking in violation of his Fifth Amendment rights, the New Haven Trustee filed a cross-appeal.[15]

The instant appeals (docketed as Nos. 74-165, 74-167 and 74-168) concern an issue which the court below found was ripe for constitutional adjudication,[16] namely, whether the RRRA produces an uncompensated, or inadequately compensated, governmental taking of private property for use by reason of compelling deficit rail operations to continue notwithstanding the erosion of Penn Central's estate. The court considered that the evidence established that

[15]Docketed as No. 74-166. See Jurisdictional Statement filed August 23, 1974, and Brief of New Haven Trustee as Cross-Appellant dated August 28, 1974.

[16]Apparently the Appellants in these cases do not challenge the determination of the court below that the interim taking and "Tucker Act remedy" issues are indeed ripe for adjudication.

substantial erosion of the Penn Central estate had taken place in four years of operations under §77, that it was continuing, and would inevitably unconstitutionally erode the interests of one or more of the classes of claimants represented by plaintiffs, who include secured creditors, unsecured creditors and stockholders of Penn Central.[17] The court quoted with approval the following appraisal and estimate of the erosion issue made by the Penn Central Trustees:

> "*Growth in priority claims against the estate.* Deprived of an adequate cash flow, the Penn Central estate has accumulated substantial priority claims ahead of all pre-bankruptcy interests. Conservatively estimated, these priority claims already aggregate at least $300 million. On a status quo assumption, another $100 million would be added in 1973. As a result, the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion." (Penn Central Trustees' Interim Report of January 1, 1973, J.D.S. 8 at p.4; quoted at JA 38-39, n. 21).

The court also quoted with approval an estimate of erosion made in March, 1973 by the Penn Central Reorganization Court:

> "Erosion. While the precise calculations have not been fully developed, the record justifies the conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million." *In re Penn Central Transportation Company*, 355 F. Supp. 1343, 1344 (E.D. Pa., 1973) (quoted at JA 40).

The court concluded:

> "Cognizant of massive operational losses of

[17]The court below was not required to, and did not, make findings as to the *amount* of erosion, the *class* of persons now affected by erosion, or the *time* at which erosion would be unconstitutional under the decisions of this Court interpreting the Fifth Amendment.

> $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." (JA 40).[18]

Reaching the merits of the interim taking issue, the court first noted that the defendants acknowledged that the RRRA "does not explicitly provide for the payment of just compensation" (JA 41) in the event that the point of unconstitutional erosion of the Penn Central estate is determined by the Reorganization Cou . to have been passed. On the issue whether there is a constitutional limit on the permitted erosion of a railroad's estate by reason of required deficit rail operations, and the factors which enter into the determination of whether that limit had been passed, the court quoted a portion of the following observations of the Penn Central Reorganization Court:

> "Underlying the provisions of Section 77 of the Bankruptcy Act is the principle that, in order to vindicate the public interest in continued rail service, the normal rights of creditors and investors may be held in suspension for a reasonable time in order to achieve reorganization, and upon reorganization may be drastically altered if necessary.

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[18]The $851,000,000 of losses covers only the period from June 21, 1970 to December 31, 1973. In addition, for the first six months of 1974, Penn Central suffered a net loss of $103,579,392 (Trustees' Report dated August 5, 1974). Thus the total deficit of the Penn Central system during four years of operations under §77 is some $955 million. This loss is *after* employing in rail operations Penn Central's *non-rail income* of $157 million (Stip. Fact. ¶11). Thus, rail operations alone during the four years have produced deficits totaling some $1.1 billion. This amount includes deferred interest and leased line rentals in default in excess of $500 million. The deficit in income available for fixed charges as the result of railroad operations is accordingly some $600 million.

> Nevertheless, there are limits beyond which this public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise." *In re Penn Central Transportation Co. (Opinion in Support of Order No. 830 re Crew-Consist Dispute)*, 347 F. Supp. 1356, 1366 (E.D. Pa. 1972); quoted in part at JA 41.

The court below fully concurred in the doctrine thus expressed, for which unqualified authority exists in decisions of this Court,[19] that the "normal rights of creditors and investors [in a railroad] may be held in suspension for a reasonable time in order to achieve reorganization," so as to "vindicate the public interest." The decision of the court was based on the corollary of that proposition: that the rights of railroad creditors and investors may not be held in suspension for more than the "reasonable" time required to determine whether a successful reorganization can be achieved. USRA conceded below that if "a point might be reached before consummation of the new [final system] plan in which the constitutionally permissible point of erosion had been reached," unless a Tucker Act remedy existed and provided an adequate remedy

[19] *Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935) (hereinafter cited as *"Rock Island"*); *Reconstruction Finance Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495 (1946) (hereinafter cited as *"Denver & Rio Grande"*); *Penn Central Merger Cases*, 389 U.S. 486 (1968); *New Haven Inclusion Cases, supra.*

at law, "the Act as a whole would probably be unconstitutional." (Colloquy between counsel and Judge Aldisert, JA 42). In the light of this concession, and pertinent factual stipulations (JA 317-323), the court reasonably concluded that the RRRA's constitutionality as respects the interim taking issue would necessarily depend on the availability and adequacy of a Tucker Act remedy which would provide compensation to the Penn Central estate in respect of the interim taking of its rail properties for public use.

The court disposed of the Appellants' Tucker Act remedy argument by a detailed analysis totally at variance with Appellants' characterizations in their briefs here.[20] Although the court's opinion discusses arguments made below by the Appellants and certain of the Appellees, as to whether the RRRA should be construed as an implied repeal of the Tucker Act, the court's opinion did not decide which of the views is correct, presumably because a resolution of these questions was not necessary to its decision.[21]

Rather, the court held that the issue of "adequate remedy at law" necessarily turned on statutory interpretation of the RRRA itself. That is, the issue was

[20]See e.g., USRA's brief at 41, asserting that the court ruled "that the Court of Claims would not have jurisdiction over any claim for a taking allegedly caused by the Rail Act because the Rail Act does not explicitly make a Tucker Act remedy available." This incorrectly states the court's opinion, as indicated in the text. Moreover, the New Haven Trustee argued below that the RRRA does not withdraw any jurisdiction conferred by 28 U.S.C. § 1491; his argument here (as it was below) is based on lack of a *substantively valid* cause of action even assuming the Court of Claims has jurisdiction. See Part I of Argument herein.

[21]JA 44-50. While the court's opinion contains an elaborate explanation of the respective jurisdictional contentions of USRA and the Penn Central Trustees, on the one hand, and of certain of the plaintiffs below, on the other, the court seems to have found it unnecessary to decide which of these conflicting views was correct. The New Haven Trustee, having stated below that the *jurisdiction* of the Court of Claims is unimpaired by the RRRA, argued that a resolution of this issue was unnecessary.

whether it was the intent of Congress to create a statutory scheme which was all-inclusive in the sense that, except by following its prescribed procedures with regard to judicial review, claimants to the estate of a railroad were to have no substantive cause of action in the Court of Claims for the changes effected in their property rights by implementation of the RRRA. The court held that this was the effect of the RRRA on these grounds:

(a) The provision of Article I, Section 9, Clause 7 of the Constitution that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (JA 50) requires that Congress, not the federal courts, make the decisions as to whether, when and in what amounts monies of the United States Treasury shall be expended.

(b) The express ceilings on appropriations (§§213(b) and 214) and on obligations of USRA (§210) preclude, as a matter of statutory construction, the possibility that Congress was willing to appropriate money to compensate any railroad's estate for interim erosion. (JA 50-51).

(c) The specificity of the delineation of judicial review contained in §§209(a) and 303 of the RRRA (JA 51) precludes, as a matter of statutory construction, that Congress granted the Special Court the power to adjudicate, as part of its §303(c) proceedings, that a constitutional "short fall" in consideration provided by the RRRA is to be made up by a monetary judgment against the United States which could be asserted in a subsequent Court of Claims action.

The first sentence of §209(a) provides in pertinent part:

> "*Notwithstanding any other provision of law*, the final system plan . . . *is not subject to review by any court* ex-

> cept in accordance with this section." (Emphasis added.)

By citing this section (JA 51), the court interpreted §209(a) to preclude any substantive cause of action surviving the judicial review provided for in the second sentence of §209(a), which reads as follows:

> "After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

It is reasonably clear (even if not explicitly stated) that the "review" referred to in the second sentence of §209(a) is solely that provided in §303(c) by the Special Court, and in §303(d) by this Court on review of the Special Court's judgment. The difficult problem of statutory construction is whether, in light of the first sentence of §209(a), Congress intended that a person aggrieved by the §303(c) judgment (as reviewed by this Court under §303(d)) could seek to litigate essentially the same issues again in the context of a suit for money damages against the United States in the Court of Claims. To answer that question, the court resorted to the legislative history.

The legislative history confirmed the court's interpretation of §209(a) that Congress did not intend that a disappointed claimant at the conclusion of the proceedings in the Special Court and this Court, as contemplated by §§303(c) and (d) could start new litigation by asserting a claim for money damages against the United States in the Court of Claims, a claim which might, if sustained, aggregate hundreds of millions or billions of dollars with respect to the Penn Central claimants. The court particularly noted the following colloquy between the two "Managers on the

Part of the House" in the debate on the Conference Committee Report:

> *Mr.* [Dan] *Kuykendall.* "Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> "Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?"
>
> *Mr.* [Brock] *Adams.* "Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the President. . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees."
>
> * * *
>
> *Mr. Kuykendall.* "There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?"
>
> *Mr. Adams.* "The gentleman is correct."
>
> *Mr. Kuykendall.* "There is no way they can assess the Congress for the money."
>
> *Mr. Adams.* "The gentleman is correct." (119 Cong. Rec. H. 11876 (1973), JA 49-50).

The court below concluded:

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act." (JA 50).[22]

[22]It is a well-accepted canon of statutory construction that where liability of the United States is involved, the Court will require a clear and

(footnote continued on next page)

Concluding that the financial obligations of the United States were intended by Congress to be "limited to the express terms of the Act," the court was compelled to find that the asserted availability of an adequate remedy at law, to wit, a Tucker Act action for a constitutional "short fall" at the conclusion of the judicial proceedings under §§303(c) and (d), did not in fact exist. It was in this context that the court observed:

> "To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particles. We simply lack such power." (JA 53).

From this conclusion, and the Appellants' concessions below that the RRRA itself provided for no compensation for the taking for interim use which would inevitably (on the basis of the stipulated facts) occur during the minimum of two or more years of deficit rail operations mandated by the RRRA, the court concluded:

> "Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Section 304(f), is also defective . . . and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c)." (JA 53).

(footnote continued from preceding page)

unambiguous expression of Congressional intent to support a reading which will subject the Treasury to a large liability. See *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922) (Holmes, J.); *United States v. Zazove*, 334 U.S. 602, 617 n. 24 (1948) (Vinson, C. J.).

SUMMARY OF ARGUMENT

Two main issues are presented by these appeals:

1. Is there an adequate remedy at law under the Tucker Act such that the constitutional issues posed by the RRRA need not be reached?

2. If there is no such adequate remedy at law, was the court below correct in enjoining enforcement of the RRRA for repugnance to the Fifth Amendment to the Constitution?

I.

On the first issue, the New Haven Trustee, as Appellee, submits that the court correctly disposed of Appellants' Tucker Act remedy arguments:

A. The RRRA on its face clearly excludes any intent on the part of Congress to subject the United States to monetary liability for the takings of private property mandated by the RRRA.

B. No court has jurisdiction to render a declaratory judgment that, upon a certain set of facts ensuing, the United States will be liable to plaintiffs in an action invoking the jurisdiction of the Court of Claims under the Tucker Act.

C. Not all cases over which the Court of Claims has jurisdiction to consider the merits involve valid causes of action. A valid cause of action under the theory of "inverse eminent domain" requires a statute which expressly authorizes the exercise of the eminent domain power. The RRRA is not such a statute. The decision of this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1953) is controlling precedent to the effect that the remedy in the Court of Claims exists only

if the statute is constitutional and authorizes the exercise of eminent domain powers. Such an interpretation of *Youngstown* is necessary in order to reconcile *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and subsequent post-*Larson* cases with *Hurley v. Kincaid*, 285 U.S. 95 (1932) and other "inverse eminent domain" cases.

D. The doctrine of adequate remedy at law requires that the New Haven Trustee have an independent cause of action against the United States under the theory of the Court's decision in *Armstrong v. United States*, 364 U.S. 40 (1960). Such a cause of action would be based on divestment of the New Haven Trustee's liens as a result of the implementation of §303(b)(2) of the RRRA, and need not await the Special Court's proceedings under §303(c).

E. A deficiency judgment against the United States for the "short fall" in the consideration provided by the RRRA would not in any event be an *adequate* remedy at law since takings require payment of just compensation entirely in money or its perfect equivalent. Moreover, judgments entered by the Court of Claims in amounts in excess of $100,000 cannot be enforced against the United States Treasury without Congressional appropriation. The legislative history of the RRRA shows that Congress did not intend to permit the United States to pay any additional amounts of government money to railroad estates beyond the $500 million of potentially available debt obligations of USRA backed by possible United States guarantees and the $85 million of grant funds authorized by §213 of the RRRA.

F. If the Court is in doubt as to whether the RRRA is intended to be an eminent domain statute, it should not render an advisory opinion that it may be sus-

tainable on the theory advanced by the Penn Central Trustees that Congress has adequate time, if it disagrees with the judicial interpretation, either to repeal the RRRA or to vote to prevent any final system plan from becoming effective pursuant to §208(a) of the RRRA.

II.

The court below was correct in holding that the RRRA requires Penn Central to devote its private property to a public use without assurance of receiving just compensation therefor:

A. Although railroad creditors may properly be restrained for a reasonable time in the exercise of their contractual foreclosure or other remedies, it is not constitutionally permissible for Congress to defer the exercise of those remedies endlessly. The court below was correct in rejecting the Government's interpretation of *New Haven Inclusion Cases* and *Penn Central Merger Cases, supra,* and in following the reasoning of the Third Circuit Court of Appeals relative to the issue of when a further restraint upon creditors amounts to an intentional uncompensated taking.

B. The New Haven reorganization, when correctly analyzed in the light of the facts of that proceeding, the positions of the New Haven creditor parties, and the procedural context in which the various judicial decisions, including *New Haven Inclusion Cases, supra,* were rendered, does not support the Government's principal theory in support of the constitutionality of the RRRA.

C. The Court's decisions in the *Rock Island* and *Denver & Rio Grande* cases, *supra,* under §77, when correctly interpreted in the light of the facts of those cases, do not support the constitutionality of the RRRA.

D. Section 304(f) of the RRRA, properly interpreted, requires USRA, during the interim period preceding the effective date of a final system plan under the RRRA, to deny Penn Central permission to terminate rail operations on, or abandon, any rail segments which might be included either in a final system plan for conveyance to Conrail, or in lines as to which any States or regional transportation authority will be prepared to commit public funds for a rail service continuation subsidy beginning within a few months after the effective date of the final system plan. Pending the effective date of a final system plan, the scope of permissible discontinuances and/or abandonments under §304(f) is negligible or non-existent. Prior decisions of the Court indicate that a statute cannot be rewritten to limit its applicability to a narrow area where it might be constitutional. This rule is applicable *a fortiori* where the plaintiffs below demonstrated that the RRRA as written is unconstitutional as applied to them.

E. Section 304(f) of the RRRA withdraws the jurisdiction of the reorganization court under §77(o) to order abandonments of rail properties of a debtor railroad and withdraws the court's equity jurisdiction to order cessation of rail operations when necessary to protect constitutional rights. Because of the policies underlying 28 U.S.C. §§2282 and 2284, only a court as there constituted can prevent this unconstitutional application of §304(f) by enjoining its enforcement.

F. The court was correct in adjudging §303(c) of the RRRA unconstitutional for failure affirmatively to provide payment of just compensation for the erosion being suffered by Penn Central during the period required to carry out the planning processes of the RRRA.

G. The court was correct in enjoining USRA from certifying a final system plan to the Special Court in view of its holding on interim erosion and the failure of §303(c) of the RRRA to provide just compensation therefor. If USRA proves to be able to devise a final system plan which does in fact provide just compensation for the interim erosion suffered by Penn Central during the period of the planning process, it can apply to the §2284 court for appropriate modification of the injunction in the light of the evidence then presented to such court.

H. The evidence was more than sufficient to support the conclusion that the Penn Central estate has already suffered substantial erosion during the four years of §77 proceedings, and that substantial erosion is continuing during the planning process of the RRRA. The court was not required to calculate the amount of erosion with mathematical precision, or to determine what claimants to the Penn Central estate are currently being affected by erosion, because one or more of the plaintiffs below are currently being injured by erosion. Substantial deficits in income available for fixed charges, plus substantial accrual of priority administration claims that have accrued during four years of §77 proceedings and are continuing to accrue, are highly probative of massive on-going erosion of the Penn Central estate. The Government introduced no evidence that appreciation of the value of balance sheet assets, even if *arguendo* such appreciation is deemed a proper offset to erosion, has been realized in amounts substantial enough to offset the erosion which has occurred and is continuing.

ARGUMENT

I

THERE IS NO "ADEQUATE REMEDY AT LAW" TO ASSURE COMPENSATION FOR THE TAKING OF PENN CENTRAL'S RAIL PROPERTIES CAUSED BY IMPLEMENTATION OF THE RRRA

The New Haven Trustee agrees with Appellants that the central issue in these cases is whether Congress intended that a litigant in proceedings pursuant to §§303(c) and (d) of the RRRA could, if disappointed by the final judgment of the Special Court, as affirmed or modified by this Court, start all over again by suit against the United States in the Court of Claims. Appellants contended below and contend here that the Tucker Act creates a remedy both for an uncompensated taking for interim use, and for an inadequately compensated permanent taking, of Penn Central's rail properties. Thus, Appellants assert that the Appellees have an "adequate remedy at law."

In summary, the New Haven Trustee's position on the availability of a Tucker Act remedy issue is as follows:

(i) The Tucker Act confers jurisdiction upon the Court of Claims in an action for money damages by a private person against the United States; and thereby constitutes a waiver, but limited to the express terms of 28 U.S.C. §1491, of the historic common law doctrine of sovereign immunity.

(ii) No court other than the Court of Claims has original jurisdiction to decide that the United States is liable in money damages for a taking of private property under the Fifth Amendment. The bar to such declaratory judgments is the doctrine of sovereign im-

munity itself, as stated by the Court in the *Sherwood*[23] and *King*[24] cases. In fact, under the *King* decision, not even the Court of Claims itself has jurisdiction to render such a declaratory judgment.[25]

(iii) The RRRA is silent as to any intent of Congress partially to repeal 28 U.S.C. §1491 in cases arising under the RRRA. No such repeal is necessary, however, to support the judgment below. That judgment is based on there not being sufficient assurance that a substantively valid cause of action would exist against the United States for an "implied taking" to make applicable the doctrine of "adequate remedy at law." The New Haven Trustee submits that the RRRA cannot fairly be interpreted as allowing a *substantively valid cause of action* to be asserted in the Court of Claims to recover the constitutional "short fall" which the RRRA itself fails to provide.

(iv) Cases such as *Hurley v. Kincaid, supra, Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), *United States v. Causby*, 328 U.S. 256 (1946), and other cases cited by Appellants[26] are inapposite because they did not arise in a context where Congress had specifically provided for *another court* to render judgment as to the value of the property being taken and the value of the consideration provided under the law as compensation therefor. The "implied takings" cases, of which the *Causby* case, *supra*, is the most celebrated example, are based on a theory of "inverse eminent domain," and are irrelevant to the decision of the issue here. The question in the instant case is whether Congress in-

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[23] *United States v. Sherwood*, 312 U.S. 584 (1941).

[24] *United States v. King*, 395 U.S. 1 (1969).

[25] Although the United States has not cited the *Sherwood* and *King* cases in its brief as Appellant, it argued below that the Penn Central Trustees' cross-motion for summary judgment based on the Tucker Act remedy was barred by the *Sherwood-King* doctrine.

[26] See, e.g., cases cited in brief of USRA at 43-47.

tended, in §§209(a) and 303(c) of the RRRA, that *all issues* concerning the value of rail properties required to be conveyed under §303(b), and the consideration therefor specified in the final system plan pursuant to statutory guide lines contained in §206 of the RRRA, should be definitively adjudicated solely by the Special Court (§303(c)) and, on appeal from its judgment (§303(d)), by this Court. If that question is answered in the affirmative, there is no adequate remedy at law; if in the negative, there could be a remedy at law for an implied taking under the "inverse eminent domain" theory. On the latter assumption only, a valid cause of action could be asserted in the Court of Claims under 28 U.S.C. §1491. In that event, the only remaining issues would be whether such a remedy is adequate (i) as to the amount and (ii) in view of 31 U.S.C. §724a, 28 U.S.C. §2517, and Article I, Section 9, Clause 7 of the Constitution, as to collectibility of the judgment.

(v) The court below concluded that there was no Tucker Act remedy, relying on both the express words of §209(a) and the legislative history. That decision was correct. It is entirely consistent with the decision of the Court in *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947), involving a statutory scheme under the Trading with the Enemy Act,[27] whereby Congress prescribed a taking of property of persons whose enemy alien status was yet to be determined, and prescribed an elaborate administrative and judicial review procedure to be followed by persons claiming to be non-enemy aliens entitled to just compensation under the Fifth Amendment. A litigant, such as the plaintiff in the *Silesian American* case, who pursued the administrative and judicial proceedings of §9(a) of the Trading with the Enemy Act and, if disappointed by the District Court, appealed to the Court of Appeals, sub-

[27]40 Stat. 411 (Oct. 6, 1917), as amended by First War Powers Act of 1941, 55 Stat. 839 (Dec. 18, 1941), 50 U.S.C. App. §§1 *et seq.*

ject to further review in this Court by certiorari, would scarcely have been permitted to start all over again in the Court of Claims. Since the Trading with the Enemy Act does not specifically repeal 28 U.S.C. §1491 as to claims of unconstitutional takings by the Alien Property Custodian, it follows that the Court of Claims would have jurisdiction over such a case but would be obliged to dismiss any complaint for want of merit. From this it can be reasonably inferred that a substantively valid cause of action "upon any claim against the United States founded either upon the Constitution or any Act of Congress. . . " (28 U.S.C. §1491) must be one which is not only valid *ab initio* under the Constitution but is not precluded by a law which purports to create an entirely different remedy cognizable in a different court. When the procedural sections, §§209(a) and 303(c) and (d) of the RRRA, are read with the substantive sections, §§206 and 210-215, the conclusion is inescapable that Congress has affirmatively legislated that railroads whose rail properties are required to be conveyed pursuant to the RRRA are to be compensated by securities of Conrail and not in excess of $500 million of obligations of USRA, as determined by the Special Court, and not by a money judgment against the United States.

(vi) Even if there is a Tucker Act remedy under the theory of inverse eminent domain, the remedy at law would still be inadequate if it were limited, as Appellants contend, to a "short fall" remedy. No authority exists for the analogous proposition, for example, that the farmer whose lands were flooded in *Hurley v. Kincaid, supra*, could constitutionally be paid partly in stock of TVA, partly in bonds of the Federal Land Bank, and the balance in money upon a judgment of the Court of Claims. The *Almota* case,[28] and a long line

[28] *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

of eminent domain cases cited in the New Haven Trustee's brief as Cross-Appellant (at 56-59), stand for the proposition that "just compensation" within the meaning of the Fifth Amendment means money or its perfect equivalent.

(vii) *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), does not stand for the proposition that a litigant's remedy at law under the Tucker Act can be assumed to be *adequate* in spite of substantial doubts as to its collectibility. Rather, it was early held in *Reeside* v. *Walker*, 52 U.S. (11 How.) 271 (1850), that no execution may be issued by any court to the Treasurer of the United States unless Congress has previously appropriated the funds to pay such judgment; and *Reeside* v. *Walker* was cited with approval in *Glidden Co.* v. *Zdanok*, *supra*. In terms of appropriations, Congress has appropriated only the following: up to $100,000 for any one judgment rendered in the Court of Claims (31 U.S.C. §724a); and $74,800,000 in appropriations pursuant to §213 of the RRRA (of which some $28,000,000 has thus far been committed).[29] The possibility that Congress would in fact appropriate funds, very likely to be required in the *hundreds of millions* or *billions*, for the purpose of paying Penn Central creditors is simply beyond the realm of reality. The *Amicus Curiae* brief filed by Congressman Brock Adams on behalf of members of Congress is eloquent for the shadow it casts.

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[29]See Foreign Assistance and Related Programs Appropriations Act, 1974, 87 Stat. 1048 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, 88 Stat. 195 (June 8, 1974) ($39.8 million).

A. Congress Has Not Provided for Just Compensation for the Taking of Private Property Mandated by the RRRA

In §§206(d)(1) and 303(c) of the RRRA, Congress has legislated the *form* of the consideration, which USRA is legally authorized to provide in the final system plan, to be exchanged for the property to be taken from the estates of railroads pursuant to §303(b). Thus, §206(d)(1) provides:

> "All rail properties to be transferred to the Corporation [i.e., Conrail]. . .by trustees of a railroad in reorganization, or by any railroad leased, operated or controlled by a railroad in reorganization in the region, *shall be transferred in exchange for stock and other securities of the Corporation* (including obligations of the Association) and other benefits accruing to such railroad by reason of such transfer." (Emphasis added).

Under §303(a)(1), Conrail is to deposit with the Special Court "all of the stock and other securities of [Conrail] and obligations of the Association designated in the final system plan to be exchanged for such rail properties;" under §303(c)(1), the Special Court *shall* test the consideration in "accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act;" under §303(c)(2)(B), if the Special Court finds that the standard of fairness and equity is not met, it *shall* order additional amounts of securities of Conrail or obligations of USRA specified in the final system plan to be issued; and, finally, under §303(c)(2)(C), if there is still failure to meet the standard of fairness and equity, the Special Court *shall* cure the lack of fairness and equity by entering a deficiency judgment against Conrail—and not against the sovereign which created Conrail. Further very

clear evidence of Congressional intent not to subject the United States and its agencies to liability is found in §206(i), where it is provided that any securities of Conrail "which purport to directly obligate the Association [i.e., USRA] shall not become effective without affirmative approval, with or without modification, by a joint resolution of the Congress."

In any event, money is not even mentioned in the RRRA as a possible medium of payment for the properties required to be conveyed by a railroad in reorganization. The reason for excluding payment in money is set out at length in the letter from Secretary of Transportation Brinegar to Senators Magnuson and Cotton.[30] The executive branch did not desire to pay in money the price for a condemnation, as Secretary Brinegar acknowledges would be necessary in the case of a taking by eminent domain. Whether or not influenced by this advice, Congress in fact legislated what is, in economic and legal effect a taking, while it omitted any provision for a payment in money. The omission of a provision for a money payment was intentional and apparently was based upon the assumption by the legislative draftsmen that the substance of the transaction could be determined by the details of the form provided in the legislation. Thus, it may be inferred that Congress accepted Secretary Brinegar's advice that if the *language* of the legislation were language of reorganization, and not language of a taking by eminent domain, there could be a "traditional" re-

[30]This letter is printed at JA 214-20; an accompanying memorandum of the Department of Transportation, together with the Department's recommendations to Congress as to the text of the draft legislation, are reproduced in full in the Appendix hereto. Secretary Brinegar advised Congress in part: "The only alternative would be to have the Government put up the cash or bonds [necessary to effect a taking by condemnation], without recourse to the Corporation. *That is clearly unacceptable.*" JA 215 (emphasis added).

organization patterned after the New Haven's inclusion in Penn Central. Conrail would thus be created by Congress to be the inclusion "partner" of Penn Central; and, as the "first step" of its "reorganization," Penn Central would be required to convey to Conrail those of its rail assets which were designated by USRA.

The constitutional validity of this result is being challenged here by the New Haven Trustee's cross-appeal. For the purposes of the instant appeals, however, it suffices to note that the legislative history establishes the firm intent of Congress that the Treasury of the United States should not be exposed to any financial liability as guarantor of the securities to be issued by Conrail in exchange for the rail properties of Penn Central and other railroads required to be conveyed to Conrail; and that USRA itself could not undertake voluntarily the role of a guarantor of Conrail's securities unless authorized to do so by a joint resolution of the Congress.

B. There Is No Original Jurisdiction in the §2284 Court to Enter a Declaratory Judgment that, if Implementation of the RRRA Results in an Inadequately Compensated Taking, the United States Will Be Liable in the Court of Claims

No court, other than the United States Court of Claims, has original jurisdiction to decide that the United States is liable in money damages for a taking of private property under the Fifth Amendment in the case at bar.[31] *United States v. Sherwood, supra.* And even the Court of Claims itself has no subject-matter jurisdiction to issue declaratory judgments decreeing that, if certain steps were followed, the United States would be liable *in futuro. United States v. King, supra.* The jurisdictional defense of the United States affirmed in the *King* case is part and parcel of the doctrine of sovereign immunity, and is not affected by procedural statutes, such as 28 U.S.C. §2201 concerning the remedy of declaratory judgments. The rule of law is clear: the United States may not be sued save as it consents to be sued; the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit; the consent to suit must be unequivocal and directly expressed; and a waiver of sovereign immunity cannot be implied. *United States v. King, supra; United States v. Sherwood, supra,* at 586, 589-91; *Mine Safety Appliances Co. v. Forrestal,* 326 U.S. 371 (1945); *Lynch v. United States,* 292 U.S. 571, 581-82 (1934).[32] The jurisdiction of the Court of Claims is clearly limited to

[31]There is one unimportant qualification: 28 U.S.C. §1346(2) grants the District Courts concurrent jurisdiction over claims of less than $10,000 arising under the Constitution. If, contrary to what is being done in the case of the RRRA, the United States were authorized by statute specifically to exercise the sovereign's power of eminent domain, the District Courts would have jurisdiction under 28 U.S.C. §1358, and the Court of Claims would have no such jurisdiction.

[32]In the *Lynch* case, Mr. Justice Brandeis' opinion for a unanimous Court held that Congress retains the power at any time to withdraw the

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claims for the present recovery of money presently due and owing from the United States. *United States v. King, supra; Glidden Co. v. Zdanok, supra.*

Furthermore, even the question whether the RRRA intended to exclude the possibility of railroad trustees bringing suit in the Court of Claims against the United States is a matter which only the Court of Claims can initially resolve, since it has exclusive jurisdiction both to determine its own jurisdiction and to adjudicate the substantive merit, or lack thereof, of all claims for money damages asserted against the United States of the magnitude involved in this case. Thus, if the Court of Claims were to determine that the RRRA violated the Penn Central's Fifth Amendment rights, that it had jurisdiction to hear the case, and that as a result of implementing the RRRA a substantively valid cause of action arose entitling Penn Central to recover judgment against the United States in a specified amount, the United States could seek review of that decision in this Court.[33] If the Court of Claims, on the other hand, were to hold that it lacked jurisdiction to consider the action because the RRRA itself constituted a withdrawal by Congress of the limited waiver of sovereign immunity otherwise available, or that, while it had jurisdiction, the RRRA itself precluded a substantive cause of action for money damages against the United States, the Penn Central Trustees could likewise seek review in this Court. These are the ways con-

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sovereign's consent to be sued even though it would deprive individuals of any remedy for a claim which (the Court held, at pp. 579-580) was based upon an abrogation of a contract in contravention of the taking clause of the Fifth Amendment.

[33]28 U.S.C. §1255. Two methods of review are provided: (1) writ of *certiorari*, and (2) certification by the Court of Claims of any question of law.

templated by law for exploration of the Tucker Act remedy in the present context.[34]

The Penn Central Trustees, as Appellants in these cases, do not assert their "Tucker Act remedy" argument merely by way of asserting an "adequate remedy at law" defense against the Appellees. The Trustees' brief here makes it clear that the relief the Trustees sought by their motion for summary judgment below is no less than a declaratory judgment that:

> "(a) If the *market value* of the consideration provided under the Act, determined as of the date of payment of that consideration, falls below the just compensation to which the Penn Central estate is constitutionally entitled, the Court of Claims *will* have jurisdiction over an action for a taking, *and must enter a judgment against the United States for any remaining amount owing;* the only defense open to the United States in that court will be that the value of the consideration paid under the Act is sufficient in amount to constitute the full just compensation necessary to satisfy the Fifth Amendment; and
>
> "(b) *If* it is determined that, by reason of the Act, Penn Central loss operations for the account of the estate *were prolonged past the point of unconstitutionality,* the Court of Claims *will have jurisdiction to award just compensation* to the estate for the taking of property occasioned thereby; the only defense open to the United States in that Court will be that the erosion caused by Penn Central loss operations did not become unconstitutional in amount before the date of conveyance, or that the Special Court has taken account of such erosion and awarded consideration to the estate of sufficient value to satisfy the Fifth Amendment.

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[34]The Penn Central Trustees have thus far refrained from commencing any action under 28 U.S.C. §1491 for the interim taking of their properties produced by implementation of the RRRA.

"In other words, *a bare holding that the jurisdiction of the Court of Claims was not repealed by the Act would be insufficient* if the United States were to retain defenses which, if successful, could frustrate a Tucker Act remedy as ensuring just compensation to the estate. Merely as one example, we think it clear that the Government must be precluded from arguing in a Court of Claims action that erosion is not compensable on the ground that the Trustees or the Reorganization Court somehow consented to the continuation of rail operations for the account of the estate, and that no taking occured for that reason.

* * *

"Since it would be hazardous, if not impossible, to try to imagine every conceivable defense to a Court of Claims action which ingenious Government counsel might formulate, the only way to ensure that the estate will receive just compensation is to preclude all defenses other than those outlined above." Brief of Penn Central Trustees as Appellants, at 63-64 (emphasis added).

By that position, the Penn Central Trustees urge this Court to limit sharply the doctrine of the *King* and *Sherwood* cases so as to enable them to support the constitutionality of the RRRA. It is clear that, if this Court refuses to formulate such an exception to the *King* and *Sherwood* doctrine, the Penn Central Trustees join the Appellees in these cases in asserting that the RRRA is unconstitutional and that the bare holding that Tucker Act jurisdiction was not withdrawn by the RRRA is insufficient to save the RRRA.[35]

[35]Aside from the Tucker Act remedy argument, the Penn Central Trustees' brief as Appellants in these cases is largely in agreement with the positions of the Appellees and with the position of the New Haven Trustee as Cross-Appellant. See particularly the Trustees' brief at 41-47 (as to interim erosion) and 54-62 (as to the inadequately compensated permanent taking); and, with respect to concurrence with the New Haven Trustee's cross-appeal, see the Trustees' brief at 48-52, arguing that the issues of whether the RRRA effects a permanent taking and the existence or non-existence of a Tucker Act remedy to provide just compensation therefor are not premature and are ripe for decision.

The Penn Central Trustees' argument that a Tucker Act remedy exists produces an anomalous judicial review pattern. The Trustees must assume, necessarily, that the Special Court's §303(c) decision, when reviewed by this Court under §303(d), would be binding on the Court of Claims under a doctrine of *res judicata* or collateral estoppel. There would thus be, under the Trustees' approach, not one but two declaratory judgments binding upon the Court of Claims in anticipation of any Court of Claims action being commenced: one by this Court on the present appeals, and a second by the Special Court in the §303(c) decision (which would be reviewed here under §303(d)). Apparently, therefore, the role thereafter of the Court of Claims, under the Trustees' approach, would be limited to adjudicating whatever remaining defenses could be deemed still open to the United States.

In this Court, it is recognized that the doctrine of *stare decisis* does not bar a revision or reversal of the *King* and *Sherwood* decisions. It should be significant to the Court, however, that the Appellees, the parties with the greatest financial stake in the outcome of this litigation, and presumably having the most to gain from this Court's entering a Tucker Act declaratory judgment as urged by the Penn Central Trustees, do *not* support that position. On the contrary, Appellees recognize that under the Constitution, Congress has the last word on appropriations. A declaratory judgment as sought by the Penn Central Trustees will, it is submitted, be at once a pyrrhic victory for the creditors and an advisory opinion by the judicial branch which is in no way binding upon Congress.

C. In the RRRA, Congress Intended to Preclude Any Substantive Cause of Action for Money Damages Against the United States in the Event that the Consideration Specified in the RRRA Was Adjudged to Be Constitutionally Inadequate

The Tucker Act is a jurisdictional statute, not a statute which creates substantive rights or remedies. The principal function of the limited grant of jurisdiction to the Court of Claims is to waive the defense of sovereign immunity in cases within the jurisdiction conferred. However, the jurisdictional grant (and waiver of sovereign immunity) is broader in scope than the nature of the valid actions which can be sustained under it. That is to say, not all cases which may be properly brought before the Court of Claims have substantive merit. The United States, USRA and the Penn Central Trustees fall into error in assuming that, so long as jurisdiction under the Tucker Act was not impliedly withdrawn, a valid substantive cause of action automatically exists merely because there is a claim properly founded on the Constitution. While the text of 28 U.S.C. §1491 may literally support that construction, it is not one which is judicially sanctioned. As the Court of Claims stated in *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002 (Ct. Cl. 1967):

> "Section 1491 of Title 28 of the United States Code allows the Court of Claims to entertain claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.' But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider un-

der Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum [citation and footnote omitted].

* * *

"The second category includes the varied litigations in which we are urged to hold that some specific provision of law embodies a command to the United States to pay the plaintiff some money upon proof of conditions which he is said to meet. Familiar examples are inverse eminent domain by a taking without formal proceedings (United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed 1206 (1946)) [other examples and citations omitted].

* * *

"In this type of case, we have held, 'a claimant who says that he is entitled to money from the United States because a statute or a regulation [or the Constitution] grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable' [citation omitted].

"Monetary claims which cannot be brought within these limits are beyond this court's jurisdiction, even though they may intimately involve the Constitution, an Act of Congress, or an executive reg-

> ulation. This is the reverse of saying that this court is not concerned with any and all pecuniary claims against the Federal Government, simply because they rely upon (and in that sense are 'founded upon') an aspect of federal constitutional, statutory or regulatory law. Where the claimant is not suing for money improperly exacted or retained (the first class defined above), the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery. A federal criminal defendant, for instance, who has been invalidly convicted or deprived of his liberty because of a violation of the Constitution or an Act of Congress cannot obtain compensation under 28 U.S.C. §1491 for his loss (although remedies may occasionally be available under the unjust conviction sections (28 U.S.C. §§1495, 2513) or some parts of the civil rights legislation) [footnote omitted].
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> * * *
>
> "Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, this court can not give relief under Section 1491, although some separate general principle—arising for example from tort law—might lead to a remedy in another forum or under some special relief provision." 372 F. 2d at 1007-09.

The principles set forth in the *Eastport Steamship* decision define the question for decision here: is there a substantively valid cause of action in the Court of Claims if (a) the RRRA was not intended as an eminent domain statute, but (b) in fact is bound to result

in inadequately compensated takings of private property for public use if not enjoined. The issue is *not*, as suggested by some Appellants, whether there is an implied repeal of the Tucker Act; the issue is the proper statutory construction of the RRRA in light of the jurisdiction conferred by the Tucker Act, and the limitation that valid causes of action against the United States must be constructed upon statutory as well as constitutional underpinnings.

The New Haven Trustee has not asserted at any time that the jurisdiction of the Court of Claims under 28 U.S.C. §1491 was impliedly repealed by the RRRA. Rather, his position is that Congress has acted in the RRRA in a preclusionary fashion with respect to the substantive cause of action. The Penn Central Trustees have *no* substantive cause of action, under the Tucker Act, for a taking for which they can invoke the jurisdiction of the Court of Claims, because Congress specifically and advisedly legislated the exclusive means of paying compensation for the properties made subject to mandatory conveyances under the RRRA. Since no monies can be paid out of the Treasury of the United States "but in Consequence of Appropriations made by Law" (Constitution, Art. I, Sec. 9, Cl. 7), the Congress has the last and only effective word on whether there shall be any payment for a taking.

This position is sustained by the text of the RRRA, its legislative history, and applicable rules of construction:

(a) The RRRA contains substantive provisions with respect to compensation which appear undoubtedly to have been intended by Congress to be exclusive, namely, those contained in §§206(d)(1), 303(a)(l), 303(c)(1), 303(c)(2)(B), and 303(c)(2)(C). It likewise ex-

pressly made the §303(c) determinations of the Special Court exclusive in §209(a), and withdrew the jurisdiction of all courts (including, presumably, courts convened pursuant to 28 U.S.C. §2284) to restrain conveyances pursuant to the final system plan after it has been certified to the Special Court. (§303(b)(2), last sentence). These compensation and jurisdiction provisions seem wholly inconsistent with the construction that Congress in enacting the RRRA intended that private claimants to the estate of a railroad would be given the opportunity to litigate once in the Special Court, appeal that judgment to this Court, and, if not satisfied with its judgment, commence a second round of litigation in the Court of Claims.

(b) The doctrine of *inclusio unius est exclusio alterius*, combined with the legislative history of the RRRA,[36] virtually requires the conclusion that Congress did not intend to subject the Treasury of the United States to an obligation to pay in legal tender for properties required to be conveyed to Conrail under the authority of the RRRA.

(c) While an obligation on the part of the United States to pay for properties taken can be implied from legislation, the cases so holding have involved statutes in which Congress clearly did not attempt to prescribe that the consideration to be issued for the taking assume a form other than a money judgment against the United States.[37]

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[36]For example, see the colloquy between Reps. Adams and Kuykendall, quoted *supra* at 18.

[37]See, *e.g.*, *Hurley v. Kincaid*, *Yearsley v. W. A. Ross Construction Co.* and *United States v. Causby*, *supra*, and other cases cited in Appellants' briefs. For a discussion of *Hurley v. Kincaid* and related cases, see *infra* at 44-46. These cases are all examples of "inverse eminent domain," a doctrine which comes into play when a statute can fairly be interpreted as authorizing the executive branch to effect a taking without formal eminent domain proceedings.

(d) Where by proper statutory construction it is determined that Congress has legislated that a taking shall not be paid for in money by the United States, the doctrine of separation of powers, and the respect due to Congress' decisions as to legislative matters, prevent the judicial branch from permitting a taking to proceed on the assurances of the executive branch that the United States will be liable to the owners of the property in the Court of Claims. See *Youngstown Sheet & Tube Co. v. Sawyer, supra* (a taking by the executive department was not authorized by Congress); *Hooe v. United States*, 218 U.S. 322 (1910) (a taking by the executive department was not authorized if the amount exceeded limits set forth in Congressional budget appropriations).

Hooe v. United States, supra, is precisely in point. *Youngstown, supra*, is significant in this context because the Court, in response to the contentions by the Government that the steel mill owners had an adequate remedy at law for President Truman's unauthorized seizure,[38] cited *Hooe* as indicating substantial doubt whether a remedy in fact existed in the Court of Claims.

The facts in *Hooe* were as follows: Congress had appropriated a fixed sum of money for a government agency to lease part of a privately owned building.

[38]In this Court, the Secretary of Commerce argued that 28 U.S.C. §1491, giving the Court of Claims jurisdiction "upon any claim against the United States . . . founded . . . upon . . . any regulation of an executive department" was applicable "regardless of the constitutional validity of the President's taking," and supplied an adequate remedy at law. Brief of Acting Attorney General and Solicitor General Perlman, May, 1952, in *Sawyer v. Youngstown Sheet & Tube Co.* (No. 51-745) at 70, 2 The Steel Seizure Case 778. *Youngstown* is thus not distinguishable on the ground argued by USRA's Brief at 46 n. 56. It is further significant that the Government in *Youngstown* relied upon *Hurley v. Kincaid*, and argued that it was a panacea for all cases of uncompensated takings. *Id.* at 769-71.

The agency negotiated a one-year lease covering all floors except the basement, but the agency also occupied the basement. After the lease expired, the landlord demanded more rent for the building, including additional rent for the basement. The agency agreed the request was reasonable, and promised to seek a supplemental appropriation from Congress for the additional rent. Based on this promise, the landlord permitted the agency to remain in the premises even though it paid on a current basis only the rent provided in the initial lease. This continued for three more years, and Congress declined to approve any supplemental appropriation. Suit was brought in the Court of Claims. The Supreme Court held that the United States was not liable to the plaintiff on the ground that there was no cause of action based on implied promise, or the Fifth Amendment taking clause, because Congress had not authorized a taking at any price, but only the use of private property at the rental provided for in the Congressional appropriation. That the Congress had not authorized the payment of *any* rent for the basement area of the building was held to bar any cause of action under a *quantum meruit* theory, or a taking theory, because if private property was "taken," it was by action of the executive branch not concurred in by the Congress.

Cases such as *Hurley v. Kincaid, supra,* involve a Congressionally authorized taking where it is clear that Congress expected to subject the United States to suit for damages, a situation quite unlike the case at bar. *Hurley v. Kincaid* involved a statute which authorized the Government to acquire either fee title or an easement for the purpose of flooding privately-owned lands in the event the Government determined that it would be more feasible to allow flood waters to overflow such lands rather than to construct levees to con-

trol flood waters. The statute provided that "No liability of any kind shall attach to or vest upon the United States for any damage from or by floods or flood waters at any place. . . ." However, a proviso to that provision made it clear that the liability of the United States precluded by the statute was liability in an action in tort for consequential damages, not liability for an actual taking of an easement for flooding. In the *Kincaid* case, the Government resisted using its eminent domain powers to take a flooding easement on the ground that it was unnecessary because the government program would not subject Kincaid's property to additional destructive flood waters. In the District Court, the factual finding was made against the Government that the plan would, in fact, cause additional destructive flood waters to pass over Kincaid's land. An injunction was accordingly issued, and was affirmed by the Court of Appeals. This judgment was reversed by this Court on the ground that:

> "Kincaid concedes that the Act is valid and that it authorizes those entrusted with its execution to take his lands or an easement therein. . . . If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded." 285 U.S. at 103-04.

The differences between the RRRA and the statute involved in *Hurley v. Kincaid* are numerous and significant. First, unlike the statute at issue in *Kincaid*, the RRRA contains no provision whatsoever expressly authorizing the United States to take property or an easement therein by eminent domain. Second, unlike *Kincaid*, the RRRA includes express provisions mandating that payment for the properties required to be conveyed take the form of stock and other securities

of, and a deficiency judgment against, a corporation created pursuant to the Act. Had the statute in *Hurley v. Kincaid* provided that farmers whose land was flooded would receive shares of stock in TVA, as determined by a specially constituted court, and had this Court held that, in addition, Kincaid had a remedy for money damages against the United States in the Court of Claims, then the case might be of some relevance to the instant case. Third, Kincaid conceded, as the Court noted, that the statute involved was a constitutionally valid enactment;[39] the New Haven Trustee and the other Appellees here make no such concession.

These differences, it is submitted, are controlling. In the RRRA, furthermore, unlike the statute involved in *Hurley v. Kincaid*, no intention of Congress to effect a compensable taking is expressed, even though the RRRA defines with particularity the actions which government agencies are to cause to be done. While these actions will have the legal effect of an uncompensated or inadequately compensated taking, they do not express a Congressional intention to exercise the eminent domain power. The legislative history is clear—Congress was acting under a misapprehension as to the extent of its Bankruptcy Clause powers. Congress believed that invocation of the word "reorganization" would have the legal effect of avoiding what is, in substance, a taking from being adjudged to be an exercise of the eminent domain power. In the words of Senator Hartke, floor manager for the bill in the Senate:

> "We are providing that the creditors of this corporation would be required to take common stock

[39]Had 28 U.S.C. §§2282 and 2284 been in effect at the time, it may be questioned whether Kincaid would have persuaded a three-judge court to issue an injunction in the light of that concession.

in the *new quasi-government operation.* In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and *this country cannot afford cessation of rail service* while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair." (Remarks of Senator Hartke; 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973); emphasis added).

This passage fairly summarizes Congressional intent as regards authorizing any taking under the RRRA. It constitutes (i) a recognition that Conrail is indeed a "new quasi-government operation;" (ii) a specification of an intent to free the rail properties of railroads in reorganization from existing liens of creditors; (iii) a statement of the policy underlying the RRRA that "this country cannot afford cessation of rail service while the railroads are put through the wringer;" and (iv) an expression of the legal concept accepted by Congress, to wit: that the "cram-down theory" (presumably a reference to §77(e)) will force creditors "to accept this kind of settlement" and that "judges have ruled that this is fair."

It is submitted that the legislative history is wholly antithetical to any theory that the RRRA was intended to be a Congressionally authorized taking statute. In a

decision which predated his opinion in *Hurley v. Kincaid* by seven years (and which is not cited in any of the Appellants' briefs), Mr. Justice Brandeis observed:

> "There can be no recovery under the Tucker Act if the intention to take is lacking. *Tempel v. United States*, 248 U.S. 121. Moreover, the Act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act. *United States v. North American Transp. & Trading Co.*, 253 U.S. 330." *Mitchell v. United States*, 267 U.S. 341, 345 (1925).

As in *Hooe v. United States, supra*, Congress did not intend in the RRRA to exercise the sovereign's eminent domain powers to effect a compensable taking. Rather, it intended to accomplish a non-compensable taking in the belief that this could be achieved through exercise of Bankruptcy Clause powers. The court below has correctly found that Congress has violated the Fifth Amendment rights of creditors and stockholders of Penn Central in the process. But that finding does not convert Congress' intent into one of effecting a compensable taking by exercise of the eminent domain power. The court below was, therefore, on sound ground in refusing, as a matter of separation of powers, to impute to Congress an intent to effect a compensable taking. Under the doctrine of the *Hooe* and *Mitchell* cases, unless this Court is able to impute this intent to Congress as a matter of fair construction of the legislation, it cannot find that a substantively valid Tucker Act action would come into existence at the conclusion of the Special Court's §303(c) proceedings.

Likewise inapposite to the present decision is *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947), cited by the Penn Central Trustees as a case "where the 'taking' statute at issue (the Trading with the En-

emy Act) contained no provision for compensation . . ." (Penn Central Trustees' Brief at 27). This characterization is inaccurate. Section 9(a) of that Act, 50 U.S.C. App. §9(a), provides in pertinent part:

> "Any person not an enemy or ally of an enemy claiming any interest, right, or title in money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder . . . may file with the said custodian a notice of his claim . . . and the President . . . may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian. . . . If the President shall not so order within sixty days . . . said claimant may institute a suit in equity in the United States District Court . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian. . . ."

Further provisions of §9(a) authorize the President to order the sale of seized property of a person claiming to be not an enemy or an ally of an enemy, such sale to take place while the suit by a claimant is pending, and limit the recovery in the suit to the proceeds of the sale unless the claimant

> "files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead."[40]

Section 7(c) of the Trading with the Enemy Act, 50 U.S.C. App. §7(c), provides, in pertinent part:

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[40]For a definitive interpretation of the continued applicability of §9(a) in light of the 1941 amendment of §5(b), see *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480 (1947), decided the same day as the *Silesian American* case.

> "The sole relief and remedy of any person having any claim to any money or other property . . . paid over to the Alien Property Custodian . . . or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property . . . shall be limited to and enforced against the net proceeds received therefrom . . . ."[41]

The Trading with the Enemy Act does indeed present some striking analogies to the RRRA, although the facts in the *Silesian American* case are hardly "similar to the present situation." Penn Central Trustees' Brief at 27. One analogy is that Congress, although it clearly authorized takings of private property, did not want to create a situation in which the Alien Property Custodian could by error subject the United States Treasury to liability of millions or hundreds of millions of dollars.[42] Hence Congress provided a different remedy: a person who claimed that the Alien Property Custodian had misclassified him as an enemy alien could (after exhausting his administrative remedies with the Custodian and the President) bring suit in equity to recover his property.[43] Recognizing, however, that the Government might find it prudent to sell the property during the course of litigation seeking its recovery, Congress provided that

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[41]It is noteworthy that in §7(c) of the Trading with the Enemy Act, Congress expressly limited the substantive cause of action available to claimants, and did not repeal the Tucker Act jurisdiction over such claims. Congress obviously believed that it was unnecessary to repeal the Tucker Act jurisdiction.

[42]For example, the *Interhandel* litigation was a claim by a Swiss Corporation which asserted that it was not controlled by nationals of Nazi Germany and was entitled to recover from the Alien Property Custodian 100% of the stock of General Aniline & Film Corporation; the value of this claim was measured in hundreds of millions of dollars. The case was ultimately settled in the 1960's.

[43]The Tucker Act provides the Court of Claims with jurisdiction only to render money judgments, and in this respect is an inferior remedy to that provided in §9(a) of the Trading with the Enemy Act.

the property could be sold. Not wishing to give the claimant in effect a right to demand that the Government then pay him whichever was the greater, the net proceeds of sale or just compensation (presumably as of the date of taking), Congress provided for a limit on the possible recovery to the net proceeds unless the claimant filed a waiver agreeing to seek only just compensation. The basic analogy to the RRRA in this scheme is that Congress has created in each instance an elaborate judicial machinery for determining issues of value of property and the compensation to be paid therefor. If there is a section of the RRRA which corresponds to §9(a) of the Trading with the Enemy Act, it is §303(c), which vests jurisdiction (within limits) in the Special Court to decide whether transfers made under §303(b) are fair and equitable and, if not, prescribing various substantive remedies, including the power of the Special Court to order Conrail to provide additional securities or to enter a deficiency judgment against Conrail. If, and to the extent that, §303(c) is perceived to parallel §§9(a) and 7(c) of the Trading with the Enemy Act, the intention of Congress in the case of the RRRA to create or permit a substantive cause of action against the United States in the Court of Claims is made even more doubtful.

A lack of a substantive cause of action for takings resulting from implementation of the RRRA would mean that the United States would have a complete defense in a Court of Claims action under the Tucker Act: the defense would rely on Congress' power to declare when and under what circumstances, if at all, the United States Treasury is subject to liability. That power, of course, derives from the express words of Article I, Section 9, Clause 7:

> "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ."

The same power was exercised by Congress in the Trading with the Enemy Act to deny a person entitled to Fifth Amendment protection a substantively valid cause of action, or to limit his recovery if his action could not, consistent with the Constitution, be denied. Furthermore, Congress did not expressly repeal the Tucker Act jurisdiction as to claims arising under §9(a) of the Trading with the Enemy Act. Presumably, if any claimant had filed a complaint in the Court of Claims, it would have been dismissed not on jurisdictional grounds but for want of a valid cause of action. Such a claimant's cause of action would not have been valid because (a) he had not exhausted administrative remedies, and upon discovering the claimant to be a non-enemy alien the President would order his property restored, or (b) if he had exhausted administrative remedies, he had not exhausted his judicial remedies in equity, or (c) if his property had been sold, he was not entitled to just compensation but only to the proceeds of the sale unless he signed the waiver. Although §9(a) is not wholly clear on this point, if the claimant signed the waiver, his claim for just compensation would presumably be adjudicated by the District Court under §9(a), from which he could appeal to the Court of Appeals and, if not satisfied, petition this Court for a writ of *certiorari*. It seems wholly untenable that, after judgment in this Court affirming the District Court's decision, such a claimant could start all over again in the Court of Claims under 28 U.S.C. §1491.

If that correctly states the law as applied under the Trading with the Enemy Act, it must be concluded that the *jurisdiction* of the Court of Claims is broader in scope than the area of substantively valid causes of action. Like all courts, the Court of Claims has cases presented to it that, for one reason or another, are without substantive merit. Congress need not concern

itself with repealing jurisdictional legislation pertaining to the Court of Claims when it perceives that no substantively valid cause of action could ever be established, or when it deliberately sets out to preclude the same. The nub of the New Haven Trustee's position on this point is that Congress intended to preclude a Tucker Act cause of action by any person aggrieved by the §303(c) decision of the Special Court, as reviewed on appeal by this Court pursuant to §303(d).

The differences, as well as the analogies, between the RRRA and the Trading with the Enemy Act are revealing. Railroad creditors as a class are apparently viewed as having a lesser degree of Fifth Amendment rights than non-enemy aliens, since they can have stock and other securities forced upon them, and "the 'cram-down' theory forces them to accept this kind of settlement."[44] Unlike non-enemy aliens, railroad creditors would not be allowed even to elect to receive the proceeds of the sale of rail properties: for example, if Conrail takes the Northeast Corridor rail properties and sells them to Amtrak for $500 million as contemplated by the RRRA,[45] Conrail keeps the proceeds. Under the Trading with the Enemy Act, the non-enemy alien has a choice of accepting net proceeds of the sale of his property or just compensation.[46]

Fort Berthold Reservation v. United States, 390 F. 2d

[44]See Senator Hartke's remarks, quoted in full *supra* at 46-47.

[45]See §206(c)(1)(C) and §601(d) of the RRRA. USRA has advised the Special Court (at the oral argument on August 27, 1974) that the "missing" $500 million in §210 not accounted for by the $1 billion of USRA obligations which may be issued to Conrail is intended to be allotted to Amtrak for this purpose.

[46]Judge Fullam observed in his Secondary Debtor 180-day decision:

"Certainly if Congress were to give Amtrak the powers of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by the RRRA, without providing the present owners of the property with cash or its equivalent." (JA 155).

686 (Ct. Cl. 1968) is cited in the Penn Central Trustees' Brief (at 16) as being "virtually on all fours with the present situation." *Fort Berthold* arose in the jurisdictional context of the Act of August 13, 1946, §24, 60 Stat. 1049, 1055, which created the Indian Claims Commission with authority to determine certain types of Indian claims against the United States which had occurred prior to the date of the Act, subject to a right to appeal to the Court of Claims; and another provision[47] gave the Court of Claims original jurisdiction to determine similar claims thereafter arising. In *Fort Berthold*, an earlier act of Congress[48] had authorized the taking of the claimants' land and arbitrarily decreed the price ($2.50 per acre) to be paid therefor. Except for the fact that Congress relented in 1946 and extended to Indian claimants rights similar to those enjoyed by other Americans since 1887, and specifically refrained from imposing the six-year statute of limitations applicable to Tucker Act suits (28 U.S.C. §2501), these Indian claimants would have been without any substantive remedy in the Court of Claims or any other court for any failure of earlier takings to have accorded them just compensation. Because Congress did relent in the case of Indian claims, these Indian claimants were afforded both an administrative hearing and a right to appellate judicial review in the Court of Claims, and the Court of Claims upheld certain of their claims some 58 years after the takings occurred. If all inadequately compensated takings were subject to suit in the Court of Claims based on 28 U.S.C. §1491, these claims could have been adjudicated long ago. It is submitted that reliance on *Fort Berthold* by the Penn Central Trustees for construction of the RRRA is wholly misplaced.

[47]Codified as 28 U.S.C. §1505 by Act of May 24, 1949, c. 139, §89(a), 63 Stat. 102.

[48]Act of June 1, 1910, 36 Stat. 455.

ley v. W. A. Ross Construction Co., supra, is not in *Years* the same reason as *Hurley v. Kincaid, supra.* In point fo private riparian owners brought an action for *Yearsley,* to their land against a government contractor damage on a river improvement project. Chief Justice working said, "it is clear that if this authority to carry Hughes project was validly conferred, that is, if what out the e was within the constitutional power of Con- was don ere is no liability on the part of the contractor gress, t cising its will." (309 U.S. at 20-21). Chief Jus- for exe hes then discussed the case on the theory that tice Hu contractor had done "constituted a taking of what th laintiffs'] property for which compensation their [made." On this theory, he held the statute must b ce the Fifth Amendment does not require pay- valid sir advance of the taking,[49] and the plaintiffs had ment in ly in the Court of Claims, citing *Hurley v.* a reme *supra.* *Kincaid,*

Case s such as *Hurley v. Kincaid* and *Yearsley* must be contras ed with cases such as *Land v. Dollar,* 330 U.S. 731 (1 47), in which plaintiffs were the stockholders of Dol ar Steamship Lines, Ltd. Facing difficult fi- nancial straits, in 1938 plaintiffs entered into a con- tract wi th the Maritime Commission under which they deliver d their stock to the Commission in exchange for fin ancial assistance and operating subsidies. In 1943, the plaintiffs demanded the return of the shares, and the Maritime Commission refused on the groun that it had acquired title to the shares. The plaintiffs sued in equity to recover their shares. The

[49]The New Haven Trustee recognizes, of course, that Congress can exercise the sovereign's eminent domain power and take private property subject to later payment of just compensation, plus interest from the date of taking, as judicially determined. However, the issue before the Court in these cases is, quite simply, whether Congress authorized such a taking and agreed to pay just compensation therefor, not whether Congress has constitutional power so to do.

suit was dismissed by the district court as an unconsented suit against the government. This Court reversed, holding that if the plaintiff's contentions were proven, they would be entitled to equitable relief to secure possession of their shares, citing *United States v. Lee*, 106 U.S. 196 (1882) and a series of cases which followed *Lee*. If *Hurley v. Kincaid* stood for the proposition for which it is cited by Appellants, *Land v. Dollar* should have been decided on the ground that the plaintiffs were in the wrong court seeking the wrong remedy, and they should have been remitted to an action for damages under the Tucker Act for the value of their shares taken by the Maritime Commission.

Land v. Dollar, supra, was then followed by two cases which, if Appellants were correct, should also have been decided by reference to *Hurley v. Kincaid, supra*, but were instead decided on the basis of sovereign immunity. In its 1949 decision in *Larson v. Domestic & Foreign Commerce Corp., supra*, the Court reconciled two divergent lines of sovereign immunity cases, one represented by *United States v. Lee, Land v. Dollar*, and *Goltra v. Weeks*, 271 U.S. 536 (1926), all holding on their facts that sovereign immunity does not bar equitable relief, and the other represented by *Goldberg v. Daniels*, 231 U.S. 218 (1913), holding that sovereign immunity is a bar. Chief Justice Vinson, for a majority of the Court, held that sovereign immunity was a bar in a case where plaintiff did not claim that the statute under which the government officer acted was itself unconstitutional, thus confining the *Lee* doctrine to cases of asserted unconstitutionality. *Lee* itself, however, should have been overruled expressly in *Larson*, if *Hurley v. Kincaid* stands for the Appellants' proposition that all governmental takings which violate the Fifth Amendment are compensable in actions under the Tucker Act, particularly since *Lee* predated the en-

actment of the Tucker Act. Mr. Justice Douglas concurred in the result in *Larson*, but would have limited its holding to government procurement cases, thus leaving the *Lee* line of cases otherwise in force. Mr. Justice Frankfurter dissented on the ground that *Larson* should have been governed by *Lee*, *Land v. Dollar* and *Goltra v. Weeks*. Both the concurring opinion and the dissent in *Larson* are inconsistent with the rule of law which Appellants claim is to be derived from *Hurley v. Kincaid*.

The second of the post-1949 sovereign immunity cases was *Malone v. Bowdoin*, 369 U.S. 643 (1962), in which plaintiffs filed an action of ejectment against a forest service officer of the United States claiming title to land occupied by the officer. The District Court dismissed the case on grounds of sovereign immunity; the Court of Appeals reversed, citing the *Lee* case. This Court (by a 4 to 3 vote) reversed, and held that the action was barred by sovereign immunity because the case was governed by *Larson*. The opinion of the majority, by Mr. Justice Stewart, has an important bearing on the scope to be given to *Hurley v. Kincaid*, *supra*:

> "While it is possible to differentiate many of these cases [e.g., *Lee*, *Land v. Dollar*] upon their individualized facts, it is fair to say that to reconcile completely all decisions of the Court in this field prior to 1949 would be a Procrustean task.
>
> "The Court's 1949 Larson decision makes it unnecessary, however, to undertake that task here . . . .
>
> "While not expressly overruling United States v. Lee, *supra*, the Court in Larson limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the Lee decision there was no remedy by which the

> plaintiff could have recovered compensation for the taking of his land, the Court interpreted Lee as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U.S., at 696. So construed, the Lee case has validity only 'where there is a claim that the holding [of property of the plaintiff] *constitutes an unconstitutional taking of property without just compensation.*
>
> "No such claim has been advanced in the present case." 369 U.S. at 646-48 (footnote omitted; emphasis added).

Since in the present case plaintiffs asserted that their property (i.e., their mortgage liens which would be divested pursuant to §303(b)(2)of the RRRA, and their right to earn a return on their investment in such mortgages) is threatened with an unconstitutional taking, it follows (on the basis of *Malone v. Bowdoin*) that the plaintiffs in the instant cases meet the test established by *Malone v. Bowdoin* and *Larson* for the applicability of the *Lee* decision. And if the reasoning of the dissent in *Malone v. Bowdoin* is followed, it is clear *a fortiori* that the Appellees have established their right to injunctive relief. Speaking for the dissent in *Malone v. Bowdoin*, Mr. Justice Douglas would have limited the *Larson* holding to government procurement cases. He observed:

> "If it [the United States] is aggrieved by the state or federal court ruling on title, it can bring its arsenal of power into play. Eminent domain—with the power immediately to take possession—is available.
>
> "If, however, the citizen must bow to the doctrine of sovereign immunity, he is precluded from any relief except a suit for damages under 28 U.S.C. §1346(b) or 28 U.S.C. §1346(a)(2), or 28 U.S.C. §1491. *This places the advantage with an all-powerful*

Government, not with the citizen." 369 U.S. at 650 (emphasis added).[50]

It should be observed in the case of the RRRA, that the alternative of the Government bringing "its arsenal of power into play. Eminent domain—with the power immediately to take possession—" is likewise available. See New Haven Trustee's Brief as Cross-Appellant at 88-92.

Larson and *Malone v. Bowdoin* were also followed in *Dugan v. Rank*, 372 U.S. 609 (1963), which is another in the series of flooding and riparian ownership cases exemplified by *Hurley v. Kincaid, supra.*[51] An action was brought in *Dugan* to enjoin the United States from impounding waters as part of a dam project thereby making plaintiff's agricultural land less valuable. The District Court granted an injunction, holding that the United States had consented to suit under the McCarran amendment, 43 U.S.C. §666. The Court reversed, not on the ground of any adequate remedy at law, but because the action was barred by sovereign immunity, citing *Larson* and *Malone v. Bowdoin*, and the McCarran amendment did not apply. Mr. Justice Clark observed:

[50]The Court has on other occasions refused to construe an eminent domain statute so narrowly that a citizen would be left only with a remedy in the Court of Claims. See e.g., *Catlin v. United States*, 324 U.S. 229, 241 (1945):

"While the language and the wording of the act [Declaration of Taking Act of February 26, 1931, 46 Stat. 1421] are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's pre-existing right to question the validity of the taking. . . . The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity *or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would cause serious question concerning the statute's validity.*" (emphasis added).

[51]Other "flooding" cases include *Jacobs v. United States*, 290 U.S. 13 (1933); *United States v. Dickinson*, 331 U.S. 745 (1947). Cf. *United States v. Causby*, 328 U.S. 256 (1946) (low flights of military aircraft over a chicken farm).

"Since the Government, through its officers here, had the power, *under authorization of Congress*, to seize the property of the respondents . . . . *and this power of seizure was constitutionally permissible*, as we held in [*Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958)], there can be no question that this case comes under the rule of Larson and Malone, *supra*. The power to seize which was granted here had no limitation placed upon it by the Congress. . . ." 372 U.S. at 622-23 (emphasis added).

If the RRRA were worded differently, no doubt it could have been sustained as a grant by Congress to the executive branch to seize plaintiff's property (i.e., their mortgage liens and their right to earn a return on their investment) as well as Penn Central's rail properties. However, it is not so worded. Not a single provision of the RRRA can fairly be interpreted as saying that Congress expressly authorized USRA, if necessary, to take by eminent domain the property of Penn Central and of its mortgage lien creditors. On the contrary, the *Amicus Curiae* brief filed in these cases by Rep. Brock Adams (on behalf of 36 Congressmen) states:

"The Tucker Act, 28 U.S.C. 1491 (1970), waiver of the sovereign's jurisdictional immunity was enacted to provide adequate opportunity for expeditious and orderly determination of claims against the government. The Tucker Act deals with the five limited areas of liability to which the government consents. The five areas do not purport to deal with the upholding of other Acts of Congress. This Court has never relied upon the presence of the Tucker Act to uphold the constitutionality of another Act of Congress.

"The logic employed in attempting to argue that the Rail Act is constitutional because of a potential Tucker Act remedy is indeed strained. Each and every act of Congress of a similar nature, irre-

spective of the amount of authorization or the process provided for in any such act, could be constitutionally upheld on the grounds that a future Tucker Act remedy might be invoked. The intent of Congress in passing the Tucker Act was not to insure the constitutionality of potential unconstitutional laws and such a precedent would be very dangerous.

"The Tucker Act remedy in such cases as *United States v. Causby*, 328 U.S. 256 (1945), and *Hurley v. Kincaid*, 285 U.S. 95 (1932), is based upon a lawful government action inadvertently causing injury to a private party which gives rise to a cause of action in the Court of Claims. Such a lawful action by the Government may result in an 'implied taking,' i.e., low-flying airplanes or flooding of property. In any of these cases, however, the original statutory action was proper, i.e., flying military airplanes or carrying out a flood control project." *Id.* at 17-18.

* * *

"The court should *not* at this time consider the availability of a future Tucker Act remedy in considering the constitutionality of the Rail Act. Any Tucker Act remedy must be based upon the facts which show an implied taking or improper erosion of creditor rights if and when the matter is presented to the Court of Claims. Any potential Tucker Act remedy is, therefore, not before this Court. *If this Court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act constitutional, then the Act must fall* since the legislative history and the language of the Act are clear that no deficiency judgment against the U.S. is authorized by the Act." *Id.* at 21-22 (emphasis added).

Under the doctrine of *United States v. Lee*, *Goltra v. Weeks* and *Land v. Dollar*, *supra*, as limited by *Larson* and *Malone v. Bowdoin*, *supra*, the Court is required to

assess whether the RRRA is constitutionally valid legislation or whether it results in an inadequately compensated taking (either permanent or interim or both) of plaintiffs' property rights. It is submitted that the answer to this question is that Congress did not purport to exercise the sovereign's eminent domain powers and, in any event, specifically intended not to permit a deficiency judgment against the United States Treasury. If, but only if, the Court can first read into the RRRA an intent to exercise the power of eminent domain, can the RRRA be sustained; and only in that event would it follow that the United States has consented to suit in the Court of Claims. If the RRRA is a constitutional exercise of the eminent domain power, the doctrine of adequate remedy at law would be applicable, and the limited exception to sovereign immunity which permits equity actions seeking to restrain the enforcement of an unconstitutional enactment would be inapplicable. The Appellants, however, would put the cart before the horse. They argue that the RRRA *is* constitutional *because* of the availability of a Tucker Act remedy. The law is otherwise: *only if* the RRRA is constitutional because the Congress in fact intended to authorize the exercise of the sovereign's eminent domain power, would there be a Tucker Act remedy. The Court below correctly held that the RRRA is unconstitutional because Congress did not authorize the exercise of the eminent domain power, and accordingly held that there is no Tucker Act remedy for any takings of private property caused by the RRRA.

In *Youngstown, supra,* counsel for the Government similarly put the cart before the horse in arguing:

> "Plaintiffs' argument is that this [Tucker Act] remedy is not available to them unless Secretary Sawyer's acts are supported by statutory or con-

stitutional authority; hence, that the preliminary question whether plaintiffs have an adequate remedy at law hinges on the very merits of the case. We submit, on the contrary, that plaintiffs have a remedy in the Court of Claims, and that therefore the Court need not reach any of the constitutional questions in order to decide that an injunction may not issue." Brief of Acting Attorney General and Solicitor General Perlman, May, 1952, in *Sawyer v. Youngstown Sheet & Tube Co.* (No. 51-745), at 55-56, 2 The Steel Seizure Case 763-64.

In these cases, the United States and USRA make precisely the same argument in support of their Tucker Act remedy defense. See United States brief at 39-48; USRA brief at 43-60.[52] The rejection of this argument by the Court in *Youngstown* is controlling precedent here. If *Hurley v. Kincaid* has the meaning ascribed to it by Appellants, then all six concurring opinions and the dissenting opinion in *Youngstown* were in error because the Justices never should have reached the merits of the asserted lack of constitutional authority to effect the seizure. If the Tucker Act remedy cures all instances of temporary takings, then the steel companies in *Youngstown* clearly had, as government counsel claimed, a complete and adequate remedy at law, similar to that upheld by this Court in *Pewee Coal Co. v. United States*, 341 U.S. 114 (1951), *affirming* 115 Ct. Cl. 626, 88 F. Supp. 426 (1950). See also *United States v. United Mineworkers*, 330 U.S. 258, 284-85 (1947) (seizure of coal mines by executive order, directing owners to continue to operate for account of the Government, is a taking "in as complete a

[52]Much of the arguments of the United States and USRA are devoted to a non-issue in this case: whether the RRRA impliedly effected a repeal of the Court of Claims Tucker Act jurisdiction. The Court below did not so hold, although such a contention was advanced by certain of the plaintiffs. The New Haven Trustee argued below, and asserts here, that there has been no implied repeal of the Tucker Act jurisdiction of the Court of Claims.

sense as if the Government held full title and ownership"). The only way in which the decision in *Youngstown* can be reconciled with the *Hurley v. Kincaid* line of cases is that the issue of adequate remedy at law itself turns on constitutional and statutory authority to exercise the eminent domain power. If the constitutional and statutory authority be lacking, either because Congress has rejected the idea of subjecting the United States Treasury to the cost of a taking (the instant case), or because Congress prescribed a different statutory route which the executive branch has declined to follow (*Youngstown*), then there is no remedy under the Tucker Act. This distinction is also the basis upon which *Youngstown* can be reconciled with *Larson v. Domestic and Foreign Commerce Corp., supra*:

> "There is no claim that [the administrator's] action constituted an unconstitutional taking . . . Only if the Administrator's action was within his authority could such a suit [in the Court of Claims under the Tucker Act] be maintained." 337 U.S. at 703 and n. 27.[53]

This Court cannot avoid deciding whether the RRRA represents a constitutional exercise of the eminent domain power, or an invalid exercise of the Bankruptcy Clause power. If, but only if, the RRRA is constitutional is it necessary to consider the nature of any Tucker Act remedy for an inadequately compensated taking.

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[53]This distinction also helps to explain why the vendor in *Armstrong v. United States, supra*, who was barred by sovereign immunity from enforcing his lien by repossession and sale, had a remedy in the Court of Claims. There was no suggestion that the Department of the Navy, in ordering the vessel to be transferred to the United States, was acting in excess of constitutional or statutory authority.

D. The Doctrine of Adequate Remedy at Law Requires that the New Haven Trustee Have an Independent Cause of Action Against the United States Under the Theory of the Armstrong Decision

In *Armstrong v. United States, supra,* this Court in 1960 upheld a judgment of the Court of Claims that the United States was liable for a taking of the interest of a vendor who supplied materials to a contractor for a naval vessel. The vendor was entitled to a lien on the property in the possession of the contractor, but when title passed to the United States the lien created by state law could not be enforced by reason of sovereign immunity. *United States v. Ansonia Brass & Copper Co.,* 218 U.S. 452 (1910). The Court held that *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935) was applicable, 364 U.S. at 44, entitling the vendor to assert that divestment of his lien is a taking of his property, 364 U.S. at 48-49, saying:

> "This [the destruction of the liens] was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens. . . . Since this acquisition [of property subject to the liens] was for a public use . . . in the circumstances of this case [the Government] did thereby take the property value of those liens within the meaning of the Fifth Amendment. . . . The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

If any of the "inverse eminent domain" cases are of relevance in the case at hand, the case most clearly in point is the *Armstrong* decision. However, the logic of the *Armstrong* decision requires a completely different type of Tucker Act remedy than that advocated by

Appellants: the New Haven Trustee, with a lien upon property securing a claim for $124 million plus accrued interest, should be entitled to judgment against the United States for $124 million plus interest (upon proof that the property subject to his liens is worth that amount), in exchange for which the United States should be subrogated to the New Haven Trustee's claim against Penn Central. The logic of *Armstrong* requires this result because the effect of §302(b)(2) of the RRRA is to divest the lien created by state law and to substitute nothing of comparable legal effect. If the Court were to hold the *Armstrong* rationale applicable, the New Haven Trustee would not have to await the §303(c) judgment of the Special Court; rather, forthwith upon divestment of his lien by the §303(b) order of the Special Court, he would file his complaint in the Court of Claims. The New Haven Trustee's remedy at law can scarcely be "adequate" unless *Armstrong* is held by the Court to be applicable to the divestment of lien legislated by §303(b) of the RRRA.

It may well be that Senator Hartke had the *Armstrong* decision in mind when he stated:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress [a reference to Senate Joint Resolution No. 59] that a number of these people [Penn Central creditors] could make a claim against the Government which could be sustained in the Court of Claims." 119 Cong. Rec. S23,783-84 (daily ed. Dec. 21, 1973) (quoted in part at JA 49).

E. A Deficiency Judgment Against the United States for a Short Fall in Consideration Would Not Guarantee Receipt of Just Compensation or Constitute an Adequate Remedy at Law, Particularly Where There Is No Assurance that Congress Would Appropriate the Funds Necessary to Pay a Judgment of the Court of Claims

The New Haven Trustee has argued in his Brief as Cross-Appellant that any exercise of the sovereign's power of eminent domain must be accompanied by statutory provision for payment in money or its perfect equivalent of the just compensation value of the properties taken (both permanently and for interim use). See New Haven Trustee's Cross-Appellant Brief at 52-83.

The Penn Central Trustees, as Appellants in these cases, seem to agree with the New Haven Trustee as to this legal conclusion, but attempt to avoid its force by an invitation to the Court to declare now the operative rules governing later judicial proceedings in both the Special Court and the Court of Claims, arguing as follows:

> "If a fully adequate Court of Claims remedy is thus established, the question remains whether the Act nonetheless infringes the Fifth Amendment because the partial consideration there provided for is to be paid in forms (*e.g.*, Conrail securities) other than cash. Even if a Court of Claims remedy is available for the deficiency, which of course will be owed in cash, arguably the form of compensation specified in the Act is constitutionally inadequate because of the rule that when property is taken for a public purpose the Constitution requires payment in cash or cash equivalent. *E.g., Almota Farmers Elev. & Whse. Co. v. United States*, 409 U.S. 470 (1973); *United States v. Reynolds*, 397 U.S. 14 (1970); *Olsen v. United States*, 292 U.S. 246 (1934); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795). This prob-

lem concerned the Reorganization Court (JA 146-47).

"We think that concern would be fully justified if the Conrail securities and other consideration tendered under the Act were valued on the basis of some alleged "intrinsic" value unrelated to their market value on the date of their receipt by the estates in reorganization. The estates would then be receiving, as partial compensation for a taking of property, nothing resembling cash or cash equivalent, but merely speculative securities the alleged value of which could be realized only after many years and only if the Special Court's prognosis of the viability of Conrail proved accurate. It was a similar problem in the New Haven reorganization which led Judge Anderson to devise an 'underwriting plan' to ensure that the New Haven estate in fact received the cash equivalent of the 'intrinsic' value attributed to the Penn Central stock it was acquiring. *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 808-10, 304 F. Supp. 1136 (D. Conn. 1969). That device was specifically approved by this Court, but for the unforeseen Penn Central bankruptcy, in *New Haven Inclusion Cases*, 399 U.S. 392, 483-89 (1970): and the Court rejected the lower court's findings as to 'intrinsic value,' since 'the fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value.' 399 U.S. at 488.

"No effective underwriting plan is permissible under the 1973 Act as presently written. We believe it follows that, pursuant to the constitutional rule with respect to cash or cash equivalent, the Special Court will be obliged to ignore any alleged 'intrinsic' value and, instead, to value the securities tendered to the estates in reorganization at no more than their cash market value on the date they are received by those estates.

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es conveyed under §303(b) of the RRRA.

No findings have been made as to what these rail properties are worth,[54] and no court has judicially determined the amount of post-January 2, 1974 erosion of the estates which would also be compensable in the Court of Claims. It suffices for present purposes, however, to note that a "deficiency judgment" as visualized by the Penn Central Trustees necessarily will involve hundreds of millions, if not *billions*, of dollars.

It is to be doubted that the United States and USRA, despite their reliance on the Tucker Act remedy, agree with the Penn Central Trustees on either the valuation of the rail properties or the valuation of Conrail's securities. Thus, unless the Court accepts the Trustees' invitation to limit the *Sherwood* and *King* doctrine by issuing a declaratory judgment as to the theory of valuation which will govern subsequent judicial proceedings, it would appear that a Tucker Act remedy, even if one exists, cannot be relied upon as an adequate remedy at law.

The United States has heretofore argued in the Special Court proceedings under §207(b), and therefore can be expected to argue in the later §303(c) proceedings, as follows: first, that the RRRA is *not* an exercise of the sovereign's power of eminent domain (see Brief of the United States at 16-36), despite the conflict between that view and their argument that a Tucker Act remedy exists for any taking found to have occurred; second, that the rail properties of the railroads have little or no liquidation value, because of the difficulties which the railroads experience in ob-

[54]Even the *method* of valuation is a matter of dispute; see New Haven Trustee's Brief as Cross-Appellant at 82. See also *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, *cert. denied sub nom. Port Authority Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968); *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub nom. Fifth Ave. Coach Lines v. City of New York*, 386 U.S. 778 (1966).

taining permission to abandon; third, that USRA's or Conrail's bonds, together with Conrail's common stock, have a value equal to or in excess of the rail properties conveyed; fourth, that a deficiency judgment against Conrail will represent value, dollar for dollar, and does not duplicate alleged value of the common stock of Conrail; fifth, that the undefined "other benefits" referred to in §206(d)(1) and §303(c)(1)(A)(i) have value sufficient to make up any remaining deficiency in consideration. If these arguments fail to carry the day, the United States can be expected to argue that only the "short fall" caused by rejection of its valuation arguments is recoverable in the Court of Claims.

When, as and if the case finally moves to the Court of Claims stage, the United States could be expected to argue on grounds of sovereign immunity that it is not bound by any unfavorable decision in the Special Court, even if sustained by this Court. See *United States v. Sherwood, supra; United States v. King, supra.* Compare *United States v. Dollar,* 196 F. 2d 551 (9th Cir. 1952), where the Court of Appeals declined to give collateral estoppel effect to *Land v. Dollar,* 184 F. 2d 245 (D.C. Cir. 1950), in which, following a trial on the merits, the *Dollar* plaintiffs received a judgment entitling them to recover their shares of stock.[55] The United States could be expected to argue in the Court of Claims that sovereign immunity makes non-binding all prior judgments as to liability of the United States for a taking. In the Court of Claims, the United States can be expected to raise at least the five lines of defense outlined above, and, presumably, other defenses as well.

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[55]But cf. *United States v. Candelaria,* 16 F. 2d 559, 562-63 (8th Cir. 1926), which gave collateral estoppel effect to *United States v. Candelaria,* 271 U.S. 432 (1926). The *Dollar* litigation was settled finally. See 344 U.S. 806, 807 (1952).

As Mr. Justice Black observed in *Youngstown Sheet & Tube Co. v. Sawyer, supra*:

> "Moreover, seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." 343 U.S. at 585.

The situation presented by the RRRA calls for valuation of properties and securities far more complex than any valuations which would have been entailed had this Court decided to remit the steel companies to their remedy, conceded to exist by the Secretary of Commerce, in the Coun of Claims. Moreover, the United States and USRA do not in these cases concede that the remedy exists, or what its measure would be; they concede only that, in the contingency of a future adverse court ruling on valuation, such a remedy might exist. These cases are thus governed *a fortiori* by the holding of the Court in *Youngstown*.

Appellant USRA (USRA's brief at 60, n. 81) summarily dismisses what is perhaps the most significant defect of the Tucker Act remedy argument: that Congress under Article I, Section 9, Clause 7, of the Constitution has the final word on whether any judgment of the Court of Claims shall be paid. Congress, in 31 U.S.C. §724a, has made a blanket appropriation of moneys to be paid to satisfy final judgments in the Court of Claims of $100,000 or less, an amount presumably sufficient for cases such as *Causby v. United States, supra* ($2,000 judgment). This amount is obviously inadequate in the instant case, even if the action were limited to recovery of the constitutional "short fall," and *a fortiori* if it is not so limited.

USRA's reliance upon *Glidden Co. v. Zdanok*, 370

U.S. 530 (1962)[56] is misplaced. *Glidden* does not hold that judgments of the Court of Claims are capable of being executed without Congressional appropriation. On the contrary, in *Glidden* the Court held that the inability of the Court of Claims to enforce its judgments by execution directed to the Secretary of the Treasury of the United States did not operate to deprive judgments of the Court of Claims of the finality inherent in a "judicial" decree of an Article III Court.[57] This is made plain by the following extracts from the opinion:

> "For claims in excess of $100,000 28 U.S.C. §2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then is the domain of our problem, *for Art. I, §9, cl. 7, vests exclusive responsibility for appropriations in Congress* and the Court early held that *no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made.* Reeside v. Walker (U.S.) 11 How. 272, 291.
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> "A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv. L. Rev. 677, 685-686 n. 63.[58] This historical record, surely more fa-

[56]The case involved the constitutional validity of an act of Congress declaring that the Court of Claims is an Article III Court in the context, not of a suit in the Court of Claims, but rather of a suit in a District Court which was reviewed by a panel of the Court of Appeals for the Second Circuit, which included a Court of Claims judge sitting by designation under 28 U.S.C. §293(a).

[57]The actual holding of *Glidden* was as follows:

"We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those Courts from exercising the judicial power provided for in Article III." 370 U.S. at 571.

[58]The Note at 46 Harv. L. Rev. 677 (1935) is entitled: "The Court of Claims: Judicial Power and Congressional Review." Its first sentence reads as follows: "The action of Congress in 'remanding' the 'case' of *Pocono Pines Assembly Hotels Co. v. United States*, to the Court of Claims

(footnote continued on next page)

vorable to prevailing parties than that obtaining in private litigation, *may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.*

"If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims *may not rely on the good faith of the United States.*" 370 U.S. at 569-71; emphasis and footnote added.

Glidden thus leaves the matter exactly where it has stood since *Reeside v. Walker, supra,* namely, that no execution (in excess of the $100,000 provided for in 31 U.S.C. §724a) may be directed to the Secretary of the Treasury until an appropriation has been made by Congress under Art. I, §9, Cl. 7.

The Court of Claims has never had occasion to issue a judgment against the United States for hundreds of millions or billions of dollars. As a practical matter, it is almost unthinkable that prudent persons would rely upon Congress' willingness, which is particularly doubtful in view of the legislative history of the RRRA, to appropriate hundreds of millions or billions of dollars to satisfy a judgment. It is at least as likely that, if the Special Court entered the declaratory judgment which the Penn Central Trustees seek, Congress would interpose the sovereign immunity of the United States. This it could do simply by expressly with-

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(footnote continued from preceding page)

raises important questions as to the nature of the decisions of that tribunal." *Pocono Pines,* 69 Ct. Cl. 91 (1930), held the United States liable to plaintiff in the sum of $227,239.54. Congress reacted by passing a law, 46 Stat. 1622 (1931) remanding the case to the Court of Claims for a new trial, with instructions to report its conclusions to Congress. Plaintiff petitioned the Supreme Court for a writ of mandamus or prohibition to prevent a further action in the Court of Claims, which petition was denied without opinion, 285 U.S. 526 (1932). The Court of Claims construed Congress' action as a fact finding reference and not as an attempt to review an already final judgment, 73 Ct. Cl. 447 (1932).

drawing jurisdiction under §1491 to hear cases arising under the RRRA.[59] If this Court were to sustain the constitutionality of the RRRA upon a Tucker Act remedy theory, its judgment will not, in any event, have the effect of final adjudication by the Court of Claims that the United States is liable to the Penn Central estate, or as to the amount of any such liability. If Congress waited until after conveyance of the Penn Central's properties to Conrail pursuant to §303(b), and then withdrew the jurisdiction of the Court of Claims to hear any claim arising from implementation of the RRRA, the *only* remedy of the Penn Central estate would be a deficiency judgment against Conrail.

That this is the most likely result is indicated by the *Amicus Curiae* brief of Rep. Adams:

> "It would seem that some creditor appellees hope and expect that if they can destroy the Act, they will force the government to nationalize the Penn Central which they hope would require the rail properties to be taken under eminent domain principles which might result in a greater cash return for them. One of the purposes of this brief *amicus curiae* is to indicate the strong resistance which exists in Congress to paying any additional amounts of government money to these estates beyond that provided in the Act." *Id.* at 16.

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[59]See the opinion of Mr. Justice Brandeis in *Lynch v. United States*, *supra*.

F. This Court Should Not Render an Advisory Opinion that a Tucker Act Remedy Saves the Constitutionality of the RRRA if Congress Does Not Repeal or Amend the Act

The Penn Central Trustees would have this Court issue an advisory opinion as to the availability of the Tucker Act remedy, even if it is not fully convinced that Congress intended to exercise eminent domain powers in enacting the RRRA:

> "We would in addition point out, however, that if the Court entertains any doubt as to Congress' intention on this score, it will not, by holding in favor of the existence of the Tucker Act remedy, compel the expenditure of any public funds contrary to the desire of Congress. If, after such a holding, Congress believes that its intent has been frustrated or that the price for continuation of rail service in the Northeast is too high if it must meet constitutional standards, Congress will have more than adequate time, prior to any compulsory conveyance under the Act, to repeal the Act or to amend it so as to avoid a taking of property. The earliest time at which compulsory conveyances under the Act could be made is September 1975. This gives Congress ample time to consider whether it still wishes such conveyances to proceed after it is fully on notice of the legal consequences thereof. Moreover, under Section 208 of the Act, Congress must review the final system plan in any event, and will have the opportunity to disapprove or to amend the final system plan, or to amend the Act, if it is unwilling to pay the cost of the taking. There is no risk whatever that unintended or undesired obligations will be incurred." Penn Central Trustees' Brief at 25.

This is, in effect, an invitation to the Court to prolong the agony of the Penn Central claimants for an additional period of time in spite of the frank recognition by the Penn Central Trustees that the result for

creditors might be that their estate would be further diminished by hundreds of millions of dollars. Aside from the propriety of such a proposal, adoption of this proposal would involve the Court in the rendering of an advisory opinion. The Court recently reviewed the origins of the rule against federal courts issuing advisory opinions and made clear the reasons for the Article III prohibitions against them. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

In the instant cases, the plaintiffs did not seek a declaratory judgment that, upon their mortgage liens being divested pursuant to §303(b)(2) of the RRRA, they would be entitled to judgment against the United States for a specific sum of money. Plaintiffs rather sought to enjoin the implementation of the RRRA as an invalid statute. Those who advocate a Tucker Act remedy approach are the defendants in these cases. The Governmental Appellants do not take the position that on the present record there could be a judgment in any particular amount against the United States; on the contrary, they can fairly be expected in future court proceedings vigorously to resist both liability and, if liability be established, the amount thereof. The present posture of the cases means that the Tucker Act remedy issue, despite all that has been written about it, has not been presented with "that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast v. Cohen, supra*, 392 U.S. at 96-97, quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). See also *United States v. Nixon*, 42 U.S.L.W. 5237, 5241 (U.S., July 24, 1974), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

II

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE RRRA COMPELS PENN CENTRAL TO CONTINUE RAIL OPERATIONS PAST THE POINT OF UNCONSTITUTIONAL EROSION, AND IN ISSUING AN INJUNCTION AGAINST §304(f) AS APPLIED TO DISCONTINUANCE OF RAIL SERVICE AND THE CERTIFICATION OF A FINAL SYSTEM PLAN UNDER §209(c)

The New Haven Trustee is wholly in accord with the views of the Penn Central Trustees, set forth in Section II of their brief (pp 30-47), that, absent a Tucker Act remedy, the RRRA requires Penn Central to devote its private property to a public use without assurance of the receipt of just compensation therefor; that on the undisputed facts the point of unconstitutional erosion of the Penn Central estate has already, or soon will be, passed; and that it was not necessary for the court below, in ruling that the implementation of the RRRA must be enjoined, to determine that the point of unconstitutional erosion had in fact already been passed, or to define erosion, or to assess its impact on Penn Central with mathematical precision.

A. This Court's Decisions, as Interpreted and Applied by the Third Circuit in the Columbus Option Case, Govern the Interim Erosion Issue

The United States' brief (at 16-37), and USRA's brief (at 75-95), argue a theory of Fifth Amendment interpretation of which the essence is that, because of the peculiar public interest in railroads, it is constitutionally permissible for Congress to defer the exercise of creditors' normal remedies endlessly. The

only limit to the doctrine which these Appellants would acknowledge is that there must be a showing that the government is doing something which *might* (without establishing whether it *will*) ultimately lead to the creditors being relieved from any continuing obligation to subsidize the public interest. The United States advanced this theory without success in *In re Penn Central Transportation Co. (Columbus Option Appeals)*, 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (U.S., May 8, 1974), No. 73-1672. There is no precedent which supports the Governmental Appellants' theory.[60]

The issues decided in *Columbus Option Appeals*, can best be seen by starting with the contentions of the parties as summarized by Circuit Judge Gibbons:

> "They [the mortgage indenture trustees] object to the sale of unmortgaged capital assets securing prior liens [$100 million of United States guaranteed Trustees' Certificates] unless (1) the proceeds of sale are applied in reduction of those liens, or (2) under the equitable rule of marshaling the prior liens are reduced *pro tanto*, or (3) the court, before it permits expenditure of the proceeds, makes the findings required for a section 77(o) sale by *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F. 2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970) (*Jersey Central*) and *In re Third Avenue Transit Corp.*, 198 F. 2d

[60]USRA's brief claims (at 93 n. 116) that its interpretation of the "decisions from *Rock Island* through *New Haven Inclusion Cases* was adopted in *In re Boston & Maine Corp.*, 484 F. 2d 369, 374-75 (1st Cir. 1973). . . ." The holding in that case does not furnish support for the Appellants' theory: ". . . while . . . the secured creditors cannot be made to devote their property, uncompensated, to the public welfare . . . the present record falls short of presenting facts sufficient to raise the issues of . . . unconstitutional taking." 484 F. 2d at 374. The Boston & Maine Railroad has been found to be reorganizable on an income basis within a reasonable time under §77. *In re Boston & Maine Corp.* (D. Mass. No. 70-250M, May 2, 1974).

703 (2d Cir. 1952) (*Third Avenue*)." 494 F. 2d at 273.

* * *

"The United States acknowledges that by resorting to first lien trustees certificates the trustees operating a railroad in reorganization can accomplish a substantial diminution of the security of the railroad's secured creditors, but urges

(1) that such result violates neither section 77 nor the fifth amendment,

(2) that its first lien is not, under the Emergency Rail Services Act of 1970, subject to the marshaling rule, and that the marshaling rule is not constitutionally required, and

(3) that the principles of the *Jersey Central* and *Third Avenue* cases are applicable only to property mortgaged by the debtor to the protesting creditor.

"Chief reliance for these positions is placed upon the *Penn Central Merger Cases*, 389 U.S. 486 (1968) and the *New Haven Inclusion Cases*, 399 U.S. 392 (1970)." 494 F. 2d at 275.

The United States thus made a three-pronged argument to the Court of Appeals which necessitated the court's deciding whether "the substantial diminution of the security of the railroad's secured creditors," that is to say, interim erosion, was or was not authorized by §77 and the Fifth Amendment. By the time the case was decided (February 6, 1974), the RRRA had been enacted, and if the result of the decision would have been in any way affected by the "light at the end of the tunnel" claimed by the Government to be afforded by the RRRA, the Court of Appeals was bound to give effect to the RRRA.

The United States relied in *Columbus Option Appeals* on the Emergency Rail Services Act of 1970, 45 U.S.C.

§662 ("1970 Act"), as authority for the propositions that:

> "it [the United States], as a superior lienholder, is required to permit the sale of all the debtor's unmortgaged capital assets and the application of the proceeds thereof for deficit operation of the railroad even if this means that junior encumbrancers must ultimately bear the entire cost of the trustees certificates." 494 F. 2d at 277.

The secured creditor parties in *Columbus Option Appeals* urged that the 1970 Act had to be interpreted in a wholly different manner in order that it not run afoul of the Fifth Amendment clause. Therefore the "interim taking" issue was squarely presented by the 1970 Act, which was then interpreted by the Court of Appeals contrary to the Government's contentions, on the ground that such an interpretation was *necessary* to avoid Fifth Amendment taking issues.

Just as it does in this case, the United States urged in *Columbus Option Appeals* that in *Penn Central Merger Cases* and *New Haven Inclusion Cases*,

> "the Court laid down a new principle of constitutional law. That new principle, they [the United States and the Penn Central Trustees] urge, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." *Id.* at 279.

This line of argument perforce required the court to analyze the entire New Haven reorganization as it pertained to *Penn Central Merger Cases* and *New Haven Inclusion Cases*. *Id.* at 279-82.

Judge Gibbons concluded as follows:

"The constitutionality of the erosion [of the New

Haven estate] which had taken place prior to the valuation date [December 31, 1966] was never presented to the Court in any proceeding in which it could have passed upon that issue. The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets. . . . The Supreme Court merely approved the reorganization court's application of settled fifth amendment law. Nothing more was presented to it in either of the cases relied on by the government and the trustees." 494 F. 2d at 282.

The Government next urged upon the Third Circuit the "light at the end of the tunnel" theory:

"The appellees suggest that we can take judicial notice of proposed legislative solutions for the northeast rail transportation crisis which at the time of argument were under active consideration in Congress and have since been enacted. They suggest, further, that such judicial notice can serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules." *Id.*

This line of argument required the panel to address the possible effect of the RRRA:

"The Regional Rail Reorganization Act of 1973 . . . enacted January 2, 1974, establishes the United States Railway Association whose duty is to prepare a final plan for acquiring and distributing some of the assets of each bankrupt northeast railroad permitted by its reorganization court to participate. If a reorganization court finds the Act does not provide a process which would be fair and equitable to the estate of the railroad, it may either attempt a separate reorganization under §77 if it finds the railroad is reorganizable on an income basis, or dismiss the reorganization proceeding. Assuming that the Act withstands constitutional scrutiny, *see, e. g.*, N.Y. Times, Jan. 25, 1974, p. 43, cols. 5-7 (New Haven trustees' suit challenging the Act),

and that the procedure contemplated is not interrupted, the transfer of assets would take place approximately 510 days after enactment. Loans and emergency grants are available, but there is no indemnification against interim losses. Section 303(c) of the Act contemplates that no more shall be paid in compensation than is 'fair and equitable', which is defined as the minimum constitutionally required. In determining whether to participate in the proceedings under the Act, the reorganization court will have to be cognizant of the limitations imposed by the fifth amendment. Unless adequate protection against interim losses can be obtained either in the form of emergency grants, loans under which the Association bears the risk and burden of loss at least ahead of secured creditors, or constitutionally compelled compensation under the final plan, it may be necessary to dismiss the reorganization." 494 F. 2d at 282 n. 9.

Columbus Option Appeals thus required the Court of Appeals to meet the issue of whether secured creditors of a railroad can constitutionally be required by Congressional enactments to bear the brunt of protecting the public's undoubted interest in a viable rail transportation system. The Court of Appeals held as follows:

"We also take notice that it is highly likely that some form of rail transportation system, publicly or privately owned, will almost certainly survive even if the present proceedings under §77 are dismissed. But such judicial notice cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured creditors to a taking. . . . Congress, in devising a legislative solution, will be bound by the fifth amendment to pay the fair value of the Penn Central properties at the time any new rail transportation entity takes them." *Id.* at 282-83.

In holding that *Third Avenue* and *Jersey Central, supra*, applied not only to pre-January 2, 1974 §77 pro-

ceedings, but also to the post-RRRA situation, the Court of Appeals made it clear that the "*Brooks-Scanlon-Louisville Joint Stock Land Bank-Third Avenue-Jersey Central*" learning is not "obsolete." On the contrary:

> "They [the *Jersey Central, Third Avenue, Rock Island, Radford, Brooks-Scanlon* line of cases] spell out the findings which must be made to insure that the reorganization court is not engaged in an intentional uncompensated taking." 494 F. 2d at 279.[61]

The New Haven Trustee submits that the evidence in the record establishes beyond any doubt that the erosion of the Penn Central estate which will necessarily occur during the planning processes of the RRRA will vastly exceed the $85 million of grants authorized by §213 of the RRRA. The court below noted that:

> "It becomes quickly apparent that the limited amount of these funds—available to railroads in reorganization in the region—have not been specially designated to meet challenges of unconstitutional erosion." (JA 31).

Accordingly, based on the Stipulation as to Factual Matters (JA 317-23), an inadequately compensated interim taking for use of Penn Central's rail properties

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[61]The United States and USRA downgrade the significance of three decisions of the Court—*Brooks-Scanlon Co. v. R.R. Commission*, 251 U.S. 396 (1920), *Bullock v. R.R. Commission of Florida*, 254 U.S. 513 (1921), and *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924)—on the dubious ground that the *size* of the enterprise determined the applicable interpretation of the Fourteenth Amendment's due process clause. See United States' brief at 19, n. 11; USRA's brief at 78 n. 96. The *Brooks-Scanlon* line of cases stands for the proposition that the owners of a public utility have a constitutional right to a fair return on their investment and, if such a return is not obtainable in rendering public service, to withdraw their invested capital and devote it to other more productive uses. This principle has not been changed by the numerous decisions since the 1930's upholding the constitutionality of acts of Congress regulating public utilities. See, *e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), quoted in New Haven Trustee's Cross-Appellant Brief at 91 n. 84.

was established. Plaintiffs were entitled to an injunction to prevent its continuance.

Whether uncompensated erosion of the Penn Central estate is currently taking stockholders' property, unsecured creditors' property, or secured creditors' property is a factual issue which the Court does not have to reach in deciding whether the decision below was correct, for the simple reason that uncompensated erosion through deficit operations must affect someone. Whoever is currently affected by erosion, be he secured creditor, unsecured creditor or stockholder, is a person entitled to the protection of the Fifth Amendment. *Columbus Option Appeals* declares that, if the erosion is incurred intentionally to benefit the public, the public's representatives (the United States) must assume the burden. Parties representing secured creditors with liens on property of Penn Central and its Secondary Debtors and non-bankrupt leased lines (New Haven Trustee and the *Connecticut General* plaintiffs), as well as unsecured creditors and stockholders (Penn Central Company, plaintiff), are now squarely before this Court asserting that *their* interests are being eroded by deficit rail operations. Since one or more parties with standing are before the Court, and one or more of them must be suffering from the erosion of the Penn Central estate, no matter how large the value of the estate may be, it follows that one or more plaintiffs is suffering that degree of irreparable economic injury which satisfies the Article III concept of standing and justifies a court exercising its equitable powers so as to prevent an unconstitutional taking of plaintiffs' properties. *Cf. Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen, supra.*

B. The New Haven Reorganization Does Not Furnish Precedent for the Government's Contention that Creditors of Penn Central Must Continue to Endure Further Uncompensated Erosion Without Limit in Time or Amount

The United States' brief (at 21-27) and USRA's brief (at 87-93) argue that continued erosion of the Penn Central estate is justified by the historical precedent of the New Haven reorganization. Significantly, the Government's argument that the RRRA does not effect an interim taking of Appellees' property relies upon a theory that derives from a purported analogy between the facts of the New Haven reorganization and those of the Penn Central reorganization. The factual analysis of the New Haven precedent contained in the United States' and USRA's briefs is, however, materially incorrect.

In early 1962, only six months after the New Haven filed for reorganization under §77, the New Haven Trustees filed a report with the New Haven Reorganization Court to the effect that the New Haven could not be reorganized other than through inclusion in a major trunk line system. The merger of the Pennsylvania and New York Central Railroads, proposed shortly thereafter, afforded such an opportunity, by reason of the authority of the ICC to condition its approval of any such merger by requiring inclusion of the New Haven in the merged system.[62] The New Haven Trustees, without any opposition from New Ha-

[62]Inclusion in the merged Penn Central was warranted, independent of New Haven's status as a carrier in reorganization under §77, on the ground that the merger would otherwise have made the New Haven's situation wholly untenable due to diversion to New York Central's rail lines in New England of substantial freight traffic historically interchanged between the New Haven and the Pennsylvania Railroad.

ven creditor interests, recommended that application be made for inclusion of New Haven in the merged Penn Central System as being in the best interest of the New Haven estate, as well as the public interest, and sought the court's authority to pursue inclusion.[63]

Throughout the course of the New Haven reorganization proceedings, it was the publicly stated position of the New Haven Trustees that it was in the best interest of the New Haven's *creditors* for railroad operations to be continued until inclusion in Penn Central was achieved and that, compared to the inclusion terms potentially available, liquidation was a less favorable route for the *creditors*. Contrary to the situation now prevailing in the Penn Central reorganization, which finds creditors opposing "inclusion" in Conrail to the point of constitutional litigation, the New Haven's creditor interests, without exception, considered that inclusion in the new trunk line system to be created by the merger of the Pennsylvania and New York Central Railroads was in the creditors' best interest. The creditors' favorable view of inclusion was based upon the fact that Penn Central was the combination of two profitable companies with combined assets in excess of 20 times the assets of the New Haven, and also upon the expectation that the merger itself would add substantially to the profit-

[63]There is no similarity between the decision of the New Haven's Trustees and creditors to pursue inclusion as being in the best interest of the estate, as well as the public interest, and the compulsion of the RRRA requiring mandatory conveyances to Conrail against the united opposition of Penn Central creditors. Congress, in §207(b), has sought to simulate the factual circumstances of the New Haven experience by delegating to the Penn Central Reorganization Court the decision to permit, or not permit, conveyance of assets to Conrail. The analogy breaks down when one considers that the New Haven Reorganization Court was not acting *sua sponte*, but merely approving a business decision of the New Haven Trustees with the concurrence of the New Haven creditors.

ability of the constituent railroads.[64] Thus, the fact that the New Haven continued to operate in the reasonable expectation that the securities of Penn Central to be received upon the inclusion would provide New Ha-

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[64]It must be kept in mind that the ICC, in approving the merger of the Pennsylvania and New York Central Railroads, accepted the evidence of those railroads that:

> ". . . their annual savings from the merger will exceed $80 million [per year] after about 8 years. . . . These large operating savings will go far toward compensating for the persistently low rates of return, and the increased earnings flowing from the merger should motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment. This in turn should enable the unified company to more fully develop and utilize the inherent advantages of railroad transportation in the territory served and provide more and better service, all to the ultimate benefit of the public." 327 I.C.C. 475, 501-02.

The Securities and Exchange Commission, in its Staff Report to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, *The Financial Collapse of the Penn Central Company* (August, 1972), stated the point as follows:

> "The merger of the Pennsylvania and New York Central railroads was repeatedly held out, both before and after the merger, as a strongly positive factor for the future, despite internal misgivings. . . . Statements made by [Penn Central] management in the early months of 1968 were highly optimistic. . . . It is clear with hindsight that the optimistic picture painted [in Penn Central's first post-merger letter to shareholders dated March 15, 1968] was not justified. . . . These generally optimistic statements on the part of [Penn Central] management . . . continued throughout the summer [of 1968]. For example, in a speech given to the New York Security Analysts' group in September 1968, [Stuart] Saunders made very optimistic statements as to merger benefits. They would be a great deal larger than projected and would be realized sooner than anticipated, he indicated." SEC Staff Report at 173-175.

The earnings reports released by Penn Central in the immediate post-merger period gave support to the false optimism then prevalent:

> "On January 30, 1969, Penn Central reported consolidated earnings of $90 million for the full year 1968, a 27-percent increase over 1967, and fourth quarter earnings of $38 million, up 32 percent. . . . Analyzing . . . the fourth quarter figures, if the effect of [various paper profits on extraordinary transactions] were eliminated, the profit would be virtually wiped out, and, for reasons stated earlier, the staff [of the SEC] believes that these were improperly booked as income. . . . From the foregoing discussion, it is clear that Penn Central on a consolidated basis earned virtually nothing in the second half of 1968 and on an unconsolidated basis had a large loss." *Id.* at 183.

ven's creditors with value at least equal to the available alternative of liquidation has no bearing on the question of how long and under what circumstances Penn Central can be *compelled* by Congressional enactment to continue to operate and to incur further massive erosion by reason of deficit rail operations. By contrast, the Penn Central Trustees have advised the Court unequivocally that the continued deficit operation of the railroad for the account of their estate can no longer be constitutionally justified. See Penn Central Trustees' brief at 30-47. The Penn Central Trustees have also advised this Court that "there is nothing within the four corners of the Act which assures the Penn Central estate of the just compensation required by the Constitution for the taking of its properties." *Id.* at 61.

The United States' Brief (at pp. 22-27) discusses several opinions entered by the various courts which reviewed the terms of the New Haven's proposed inclusion in the merged Penn Central system as though they were entered in the context of the New Haven bondholders' having opposed inclusion in Penn Central. That discussion incorrectly pictures the procedural setting of those judicial decisions, and attempts to derive a rule of law that is without foundation in the opinions upon which the United States relies.

In 1967, the Court refused to approve consummation of the Penn Central merger until the ICC afforded adequate traffic protection to certain eastern railroads not to be included in the merger. *Baltimore & Ohio R.R. v. United States*, 389 U.S. 372 (1967). Because of that decision, it was generally recognized that, at the least, the Penn Central merger would be considerably delayed and there was concern whether the

merger might abort.[65]

In this context of doubt whether the Penn Central merger would ever come to pass, carrying with it the possible frustration of the New Haven Trustees' and creditors' hopes, the New Haven Trustees petitioned the New Haven's Reorganization Court for instructions, and some of the bondholders then cross-petitioned to dismiss the New Haven reorganization proceedings and liquidate the railroad.[66] Shortly after the motions were argued, the ICC on June 9, 1967 issued supplemental reports in both the Pennsylvania-Central and Norfolk & Western merger cases, curing the defects found by the Court in the *Baltimore & Ohio* case, *supra*. Expedited review by a three-judge District Court and the Court followed. Significantly, during that review period, the New Haven bondholders whose §77(g) motion was *sub judice* took a position diametrically opposed to the one which might be inferred from the United States' brief. Instead of pressing for termination of the reorganization and for liquidation, as are the creditors in Penn Central, the New Haven's bondholders in 1967 were urging the promptest possible inclusion of New Haven in the proposed Penn-Central system.

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[65]For example, in a decision of the Court of Appeals for the Second Circuit, entered two months after the Supreme Court decision, Judge Friendly observed:

> "As a result of the decision in *Baltimore & Ohio R.R. v. United States, supra*, and its probable sequelae, it is by no means certain that there ever will be a Penn Central in which the New Haven can be included. At the very best the time-table envisioned by the Trustees in September, 1966 . . . has been thrown badly out of kilter." *In re New York, N.H. & H. R.R.*, 378 F. 2d 635, (2d Cir. 1967).

[66]As Judge Anderson later noted: "The cross-petitioners . . . asked *either for an immediate take-over of the New Haven by the Penn Central*, once the merger was approved, *or* for the termination of the reorganization proceedings and liquidation of the Railroad." *In re New York, N.H. & H. R.R. (Order No. 441)*, 281 F. Supp. 65, 66 (D. Conn. 1968) (emphasis added).

Thus, the pertinent issue when the New Haven inclusion was first before the Court in December, 1967, was created by the New Haven bondholders' dissatisfaction with the terms of inclusion fixed by the ICC (which objections, going both to valuation of properties and valuation of securities, were later sustained in substantial part by the courts). The procedural context in which the case arose involved an attempt by the Penn Central management to deny the New Haven bondholders effective judicial review of the ICC's decision by offering to go forward with inclusion only on the basis of the ICC approved terms. This took the form of a refusal of Penn and Central managements to agree to carry out the inclusion before the exact terms were finally adjudicated. The issue was thus not whether the New Haven should be liquidated rather than kept alive until it could be included in Penn Central, as the Governmental Appellants assert.

The oft-cited reference in Mr. Justice Fortas' opinion to "Procrustean measures"[67] was not, as would appear from the United States Brief (at 23-24), in response to an attempt to shut down the New Haven's operations in disregard of the public interest in order to benefit creditors. Instead, the Court's "Procrustean measures" passage referred to an attempt by certain New Haven bondholders to gain a bargaining advantage in order to deal with the intransigence of the Penn and Central managements. This attempt by a small segment of New Haven bondholders was opposed by the New Haven Trustees on the ground that it could well backfire and frustrate the ultimate inclusion of the New Haven in Penn Central that had long been sought by the creditors. The New Haven

[67] *Penn Central Merger Cases, supra,* 389 U.S. at 510-11.

Trustees therefore opposed the attempt by these bondholders to postpone the Penn Central merger until the Penn and Central managements agreed to inclusion terms more favorable than those fixed by the ICC.

The New Haven Trustees argued to the Court that the risk of frustration of the merger was not warranted from a New Haven standpoint so long as Penn Central would be committed by the act of merging to pay such inclusion terms as were finally set by the judicial process.[68] This issue was raised directly in the argument before the Court, and counsel for the Pennsylvania and New York Central Railroads thereupon orally agreed that the merged company would be so bound.[69] It was in light of Penn Central's agreement that the price would be "open-ended" on the "up side," and in the total absence of any indication that the post-merger judicial review of the ICC's terms of inclusion would not be sufficient to guarantee fairness and equity, that Mr. Justice Fortas referred to the attempt by some bondholders to delay the merger as calling for "Procrustean measures." Thus, the quotation from the Court's opinion (United States' brief, at 23-24) does not provide support for the conclusions which the Government would have the Court now draw from it.

The same is true with regard to Judge Anderson's decisions, quoted in the United States' brief (at 24-25); and in USRA's brief (at 88-93).

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[68]The New Haven's operations became subject to a serious cash drain that began in 1967. The only source of cash potentially available was Penn Central, which, by the act of merging, would be committed to lend the necessary funds to the New Haven Trustees, as well as to assume about one-half of the New Haven's post-merger but pre-inclusion operating losses. Funds were projected to be needed in early 1968, so postponement of the merger could have defeated inclusion. This was a result perceived by all concerned to be detrimental to the New Haven estate.

[69]See colloquy between Mr. Justice Brennan and counsel for Penn Central, quoted in *In re New York, N.H. & H. R.R. (Decision on Reorganization Plan)*, 289 F. Supp. 451, 460 (D. Conn. 1968).

In the first place, the United States is in factual error when it says:

> "The New Haven creditors thereupon petitioned the reorganization court to dismiss the proceedings . . ." (United States' brief at 24).

As noted above, the cross-petition for dismissal of the reorganization had been filed *prior* to the decision of this Court in *Penn Central Merger Cases*, at a time when the Penn Central merger seemed doomed to lengthy postponement, if not frustration. While the cross-petition was *sub judice*, the Court had decided the *Penn Central Merger Cases* less than nine months after its initial decision in the *Baltimore & Ohio* case rejecting the merger. Circumstances having so changed since the filing of the cross-petition, and a majority of the New Haven bondholders having continued to recognize that inclusion in Penn Central was preferable to liquidation, the New Haven Reorganization Court properly concluded that, with the merger having already taken place and inclusion hopefully close at hand, and with Penn-Central obliged to pay judically approved terms, dismissal of the reorganization and liquidation of the New Haven's rail operations would have been not only an unsound exercise of judicial discretion but a counter-productive move from the standpoint of the New Haven bondholders. *In re New York, N.H. & H. R.R. (Order No. 441)*, *supra*, 281 F. Supp. at 68-69.[70]

However, circumstances later changed again, and the New Haven Reorganization Court responded

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[70] "The cross-petitioners are apparently the only ones who seek liquidation. Neither the trustees for any of the series of bonds nor any other creditors have joined in the cross-petitions.

"It would be an abuse of discretion and error on the part of this court to entertain and approve of action by the cross-petitioners designed to scuttle the entire reorganization proceeding when such a course . . . would . . .be of no benefit to the creditors. . . ." *Id.*

promptly and properly to that change. Judge Anderson first concluded that the inclusion terms fixed by the ICC in its *Second Supplemental Report*, 331 I.C.C. 643 (Nov. 16, 1967) were inadequate and necessitated a remand to the ICC for further proceedings, with the probability that further lengthy judicial review proceedings would follow the ICC's order on remand. This problem was aggravated by cash attrition due to worsening deficit rail operations (both passenger and freight). The cash then on hand was virtually exhausted even after giving effect to financial assistance which Penn Central was required to furnish the New Haven. Judge Anderson then concluded on August 10, 1968, on constitutional grounds, that he could not condone additional priority borrowing necessary to continue New Haven's rail operations into 1969. Significantly, the decision that railroad operations would cease was reached notwithstanding existing assurances both that the New Haven would ultimately be included in the merged Penn Central system and that the inclusion would necessarily be on terms found to be fair and equitable after judicial review. By contrast, the RRRA provides no assurance that there will ever be an "inclusion," i.e., a Congressionally approved final system plan and, even if there is one, that its terms will ever be judicially approved as fair and equitable.

Of the several decisions involving the New Haven reorganization that are cited by the United States, the one which fairly may be cited for its bearing on the instant situation is Judge Anderson's August 10, 1968 opinion at 289 F. Supp. 451, 459:

> "In view of the history of this deficit operation from the time of the filing of the petition under §77 and even before, the size of the losses, the long period of time necessarily involved in seeking to work out a solution, short of liquidation, through inclusion in the Penn-Central, the present con-

dition of the Railroad and the rate of loss and outflow of cash in the recent past and in the foreseeable future, this court finds that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders, without just compensation. It is therefore constitutionally impermissible, and obviously no reorganization plan which calls for such a taking can be approved."

The foregoing passage was cited favorably by the Court in the *New Haven Inclusion Cases*, *supra*, 399 U.S. at 491.

The New Haven Trustee recognizes that §77 is constitutional insofar as it permits a reasonable time during which the public interest is afforded its "one bite at the apple" in the form of a reasonable attempt to reorganize the enterprise. That chapter of the Penn Central reorganization is covered by the period from June 21, 1970 to January 1, 1973, the date when the Penn Central Trustees advised Judge Fullam that Penn Central could not be reorganized absent extraordinary amounts of governmental grants.[71] A second bite at the apple has taken place since January 1, 1973 and is continuing while this case is *sub judice*. The principle advocated by the United States here results in the so-called balancing process between public and private interests becoming a never-ending nibbling at the apple, so long as it can be said that Congress and the agencies of the executive branch are conscientiously continuing to attempt the formulation of a solution. Further, the United States adds a corollary: if a reorganization proceeding reaches the point where reorganization under existing law must finally be rec-

[71]The Trustees' January 1, 1973 and February 1, 1973 Reports (J.D.S. 8, 9) estimated that governmental grants (not loans) in the amount of $600 million to $800 million were necessary.

ognized as impossible, Congress is permitted to amend the reorganization law and, if it does, the balancing process starts all over again. Presumably, if its second attempt to solve the rail crisis proved inadequate to meet constitutional safeguards, Congress could enact still another statute designed to provide a public interest "solution" to the continuing and unsolved problem of Penn Central rail operating deficits, while requiring creditors to absorb further operating losses. Under the Government theory, this procedure could be repeated, *ad infinitum*, or until the problem was finally recognized by the Congress to be hopeless absent nationalization of the railroad.

With this theory, the United States brushes aside (and indeed denies) the erosion already incurred by the Penn Central estate during more than four years of §77 proceedings; and it treats as irrelevant the specific findings made by the Penn Central Reorganization Court in its May 2, 1974 Opinion and Order No. 1543 in connection with the findings required by the first sentence of §207(b) of the RRRA (JA 84-103). According to the United States, the four years during which private claimants' legal rights have been subordinated to the public interest count for nothing, because a new statute may offer, it is argued, as little as two more years (and several hundreds of millions of dollars) of additional erosion before private creditors are finally accorded some measure of relief from the duty to continue to finance the public interest.

It is significant that the United States and USRA fail to address the implications from the fact that, as early as February 10, 1971, the Penn Central Trustees publicly stated that governmental assistance was urgently needed by Penn Central in order for it to meet

four "conditions to viability" as a private enterprise.[72] Virtually nothing was done by the Congress, the ICC or any other agency of the government to assist the achievement of these four conditions.[73] When the Trustees said in their January 1, 1973 Report that reorganization of Penn Central on an income basis was impossible, it took fully one year for the enactment of the RRRA—a solution which, as the New Haven Trustee has argued in his brief as Cross-Appellant, has proved to be both unconstitutional as a matter of law, and wholly inadequate as a matter of economics.

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[72]Trustees' Report dated February 10, 1971. (J.D.S. 1). USRA's Brief at 30 describes the four conditions to viability.

[73]Significantly, no mention is made of any steps taken by the government to assist the Trustees during the nearly two years between that Report and the January 1, 1973 Trustees' Report (J.D.S. 8). It is also noteworthy that when it did take action, Congress aggravated the Penn Central's problems by preventing a solution of the crew-consist issue. By contrast, in the New Haven reorganization the States of Massachusetts, Rhode Island, Connecticut and New York in 1965 agreed on contributions totaling approximately $5,500,000 per year, which was one-third to one-fourth the New Haven's net operating loss. See *In re New York, N.H. & H. R.R. (Order No. 441), supra*, 281 F. Supp. at 66. The United States, however, provided only $12,500,000 of loan guarantees to New Haven, and nothing by way of grant.

C. The Rock Island and Denver & Rio Grande Cases Do Not Furnish Support for the Government's Theory

The attempt of the United States and USRA to draw support for their argument from the *Rock Island*[74] and *Denver & Rio Grande*[75] cases (United States' brief at 20-22; USRA's brief at 84-86) is similarly unpersuasive. In the *Rock Island* case, the §77 petition had been filed on June 7, 1933, shortly after enactment of §77, on March 3, 1933.[76] The case was promptly heard by the Rock Island's reorganization court, which issued an order on November 22, 1933 denying a petition by secured creditors for permission to foreclose on a pledge. The District Court's decision was affirmed by the Court of Appeals on July 23, 1934, 72 F. 2d 443 (7th Cir. 1934). Certiorari was granted, 293 U.S. 550, 551 (1934), and the case was argued February 12, 1935 and decided April 1, 1935, at which point the debtor's §77 proceedings had consumed but 22 months. But the Court in 1935 thought that 22 months was perilously close to being an *excessive* period in which to restrain creditors from the exercise of their normal remedies, justifying the *long delay* on the basis of its having been caused by the constitutional test litigation launched by the creditors:

> "If this *long delay* were without adequate excuse, the retention of the injunction for the *long period* which has intervened since it was granted *could not be justified.*" 294 U.S. at 685 (emphasis added).

The United States' brief (at 21) quotes a portion of the text in which the foregoing quotation appears. The portion omitted from the quotation in the United

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[74] *Continental Ill. Nat. Bank v. Chicago, R.I. & Pac. Ry., supra.*

[75] *Reconstruction Finance Corp. v. Denver & R.G.W. R.R., supra.*

[76] 47 Stat. 1474.

States' brief, indicated by asterisks, includes these words:

> "Until they [doubts concerning the constitutional validity of §77] are finally resolved, the consummation, or even the preparation, of any definite plan is plainly impracticable."

The omission is significant. In Penn Central's case, more than four years have elapsed since the §77 filing on June 21, 1970. The ICC had three plans for reorganization submitted to it commencing as early as June 28, 1973; it rejected all of them on September 28, 1973. The ICC at the same time formulated no plan of its own, as was its statutory duty under §77. Instead, although the ICC indicated it would hold further hearings on a plan for Penn Central, in the year since its first Report it has not done so. The New Haven Trustee's §77(g) motion to dismiss Penn Central's §77 proceedings has been pending before the Penn Central Reorganization Court since October 9, 1973.[77]

Even more significant, however, is the absence of any assurance that resolution of the instant cases, concerning the constitutional validity of the RRRA, will lead to the consummation, or even the preparation of any definitive plan for reorganization of Penn Central. This conclusion is equally true on the assumption that the RRRA is found here to be defective under the Fifth Amendment, on the one hand, or if the RRRA is upheld on the basis of a finding of a Tucker Act remedy, on the other. In the latter event, there would be a drawn out valuation proceeding under §303(c) which, it is understood, the Government recognizes as requiring a time-table of 5 to 10 years, including appellate review here; and that period would be followed by

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[77]Not until May 6, 1974 was a hearing held on the motion; a further hearing was held September 19, 1974.

a Court of Claims action, perhaps consuming another two years. A period would then follow in which Congress' decision would be taken as to whether or not it would appropriate the funds needed to meet any judgment certified to it pursuant to 28 U.S.C. §2518. Then, and only then, would a plan for the reorganization of Penn Central dealing with its creditors' rights be filed with the ICC. Additional time would be required for the ICC's administrative hearings on such a plan, its report and order thereon, and judicial review of its report and order by the Penn Central Reorganization Court (which would have also the duty of adjudicating a large number of proofs-of-claim, and such matters as the remand issues from *New Haven Inclusion Cases, supra*). Assuming that the distributive phase could be completed in three years, a plan for reorganization of Penn Central must reasonably be estimated to require a minimum of 10 to 15 years if the RRRA is to be implemented. It must further be emphasized that this estimate is premised on the assumption that Congress will not veto the first final system plan filed with it by USRA. A Congressional veto of one or more final system plans, together with the time required for Congress to respond to a Tucker Act judgment, might well stretch the process into the twenty-first century.

The injunction against mortgage creditors exercising their normal foreclosure remedies contained in Order No. 1 has been in effect for over four years. Moreover, some of the creditors' liens which are thus restrained may not even be primarily on railroad properties. The *Rock Island* decision is limited to the sound proposition that a *reasonable* delay during which exercise of creditors' rights is deferred is constitutionally permissible. Conceptually and practically, *Rock Island* cannot be deemed to support the United States' con-

tentions with regard to the effect of the RRRA upon Penn Central's secured creditors.[78]

The reliance of the United States and USRA on the *Denver & Rio Grande* case, (United States' brief at 21; USRA's brief at 86) is likewise unwarranted:

1. The Denver & Rio Grande filed under §77 on November 1, 1935. As of December 31, 1935 its current assets were $5,966,667 (of which $1,257,943 was cash). By December 31, 1944, current assets had increased to $32,665,501 (of which $19,142,627 was cash). The total deferred liabilities (including unpaid accrued interest) from November 1, 1935 was $55,310,152. See 328 U.S. 500, at 513-14. In addition to the increase in current assets of $26,698,834, the Court's opinion (328 U.S. at 514-15) states that a net capital addition of approximately $30,000,000 was made out of internally generated funds, principally in the purchase of $43,000,000 of new locomotive and freight cars to handle increased war-time business, net of $13,000,000 of book value of equipment retired

[78]USRA's brief at 85 n. 106 sets out an oblique attack on the Third Circuit's *Columbus Option Appeals* decision, *supra*, on the ground that it involves a factual misreading of the *Rock Island* decision. The New Haven Trustee agrees that the *Rock Island* decision did not turn on the value of the collateral underlying the notes; this was a suggestion of the author of the Note in 82 Yale L.J. 1004, 1112 (1973), which appears to be without support. The Third Circuit's decision in *Columbus Option Appeals* is in no way dependent upon the commentator's misreading of the *Rock Island* decision. The correct reading of the *Rock Island* decision is that of Judge Anderson, *In re New York, N. H. & H. R. R., supra*, 289 F. Supp. at 459: "In [*Rock Island*] the Supreme Court sustained an order of the bankruptcy court enjoining creditors who held collateral notes from selling the collateral despite the possibility of a decline in its value during the period of restraint. Noting that the value of the collateral greatly exceeded the secured indebtedness and that the order contemplated only reasonable delay, the Court nevertheless suggested that the order would have to be reconsidered if injury to creditors became irreparable through an unreasonably long delay in the proceedings before the bankruptcy court." This reading may be viewed as having been impliedly approved by this Court in *New Haven Inclusion Cases, supra*, 399 U.S. at 491.

from use. Since the book value of the railroad's assets increased by $56.7 million, in the *Denver & Rio Grande* case there was no erosion during its nine years of §77 reorganization.[79]

2. The Denver & Rio Grande had income available for fixed charges in every year of its operation under §77. The amount of such income varied from a low of $2,893,255 during the 3 years 1936-38 to $5,019,436 in 1941. 328 U.S. at 514. In the following war-time years, income available for fixed charges was $17,044,420 (1942), $11,573,668 (1943) and $8,157,880 (1944). 328 U.S. at 514, n. 18. The total net income available for fixed charges during the reorganization (through December 31, 1944) amounted to $49,420,972. 328 U.S. at 542 (dissenting opinion of Frankfurter, J.). This income exceeded accrued interest on senior secured claims by approximately $9,500,000. *Id.*

3. The fact that the holders of the General Mortgage Bonds of the Denver & Rio Grande (the so-called "Junior Generals") received only common stock of a par value equal to 10% of their claims hardly provides a precedent for the RRRA. All other secured creditors of Denver & Rio Grande received mortgage bonds and common stock of a par value equal to their claims, including interest accrued thereon. The Junior General's contract rights made them subordinate to all other secured claimants of the Denver & Rio Grande estate.

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[79]In Penn Central's case, by contrast, book value of railroad physical assets declined from $2,889,799,000 at Dec. 31, 1970 to $2,618,390,000 at Dec. 31, 1973, a reduction of $271,409,000. 1973 Form R-1 Report, Schedule 200A; 1970 Form A Report, Schedule 200A. At Dec. 31, 1973, accrued administration expenses amounted to a sum in excess of $546,000,000. Stip. Fact, ¶¶12-15. Thus the indicated erosion, computed in the same manner as in the *Denver & Rio Grande* case, is $817 million as of Dec. 31, 1973. See Part II-H, *infra*, for a discussion of the erosion evidence.

Under the "rule of absolute priority" of *Boyd*,[80] *Los Angeles Lumber*,[81] and *Consolidated Rock Products*,[82] the holders of Junior Generals could not reasonably have expected to receive treatment *pari passu* with the other secured claimants unless there was found to be an equity for the common stock. The ICC valued the Denver & Rio Grande's assets in accordance with the capitalization of earnings method prescribed by §77(e); such valuation showed that the common stock was without value, and the Junior Generals had only a partial equity. While this factual conclusion itself was controversial (see opinion of the Court of Appeals for the Tenth Circuit, 150 F. 2d 28; dissenting opinion of Frankfurter, J., 328 U.S. at 536-49), the dispute in *Denver & Rio Grande* concerned the application of acknowledged rules of statutory construction and constitutional interpretation to a disputed factual situation.

In the case of Penn Central, the hopeless rail deficits are factually acknowledged, and the dispute concerns the proper application of constitutional principles to a novel statute. The RRRA was designed to create a "reorganization" when the facts indicate that no reorganization in the accepted legal definition of that word is possible. The *Denver & Rio Grande* decision provides no assistance in meeting the issue whether the RRRA exceeds Congress' Bankruptcy Clause powers, and offends the Fifth Amendment, by subjecting Penn Central's claimants to the reduction of their equity by continued erosion and to an ultimate deprivation of the property securing their claims without just compensation.

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[80] *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913).

[81] *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

[82] *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510 (1941).

D. The Court Below Correctly Construed §304(f) of the RRRA to Require the Affirmative Assent of USRA to any Termination of Rail Operations

The USRA Brief asserts (at 61-66) that the court below failed to construe §304(f) correctly, arguing that a narrow construction of that section would have enabled the court to defer reaching the constitutional issues presented by the RRRA.[83]

On the issue of the proper construction of §304(f), it is necessary that this subsection be read in the light of §304 as a totality (see JA 416-17), for it has no meaning separate and apart from the balance of §304. It is apparent on the face of §304 that, if the provisions limiting the right to abandon even rail segments which are not included in the final system plan, particularly the provisions found in §304(c)(2), are to be made effective, then such lines must not be discontinued or abandoned before the date the final system plan becomes effective. And, obviously, it was not the intent of Congress to permit interim discontinuance or abandonment of the rail segments which are included in the Conrail system by designation in the final system plan.[84]

Thus, the area of possible interim discontinuances and abandonments permitted under §304(f) is confined to a particular rail line whose current traffic is so

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[83]In his cross-appeal, the New Haven Trustee has dealt with the reasons why the constitutional issues are not premature, and why this case is governed by *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Roe v. Wade*, 410 U.S. 113 (1973), rather than by *Poe v. Ullman*, 367 U.S. 497 (1961). See New Haven Trustee's Cross-Appellant Brief at 24-36. USRA's contentions as to prematurity, accordingly, are not further addressed here.

[84]See letter dated April 26, 1974 from Rep. Brock Adams to John W. Barnum, Under Secretary of Transportation, reprinted in full in Penn Central Trustees' Brief, Appendix B, at 7a-9a.

insignificant that a State would be unwilling to indicate to USRA an intent to commit local tax monies to its support. This is the true meaning of the phrase in §304(f): "unless no affected State or local or regional transportation authority reasonably opposes such action."

Significantly, the USRA brief does not advance any contrary interpretation of §304(f). Rather, USRA, without citing any authority in point, seems to suggest that the RRRA ought to read with a judicial gloss that it is not to be taken seriously in the event a literal interpretation would require "erosion beyond constitutional limits" (USRA brief at 64). Cases such as *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), cited in USRA's brief (at 64-65) stand for a different proposition entirely: when a statute is attacked as being "void for vagueness," but its meaning is plain as to the plaintiff's factual situation, an attack on the statute as being facially defective as applied to other possible situations will not be considered. This is but an application of the rule that:

> "One to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17 (1960), relying upon *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912).

More to the point than the cases cited in the USRA brief (at 65-66) is *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), in which §6 of the Subversive Activities Control Act of 1950 was held unconstitutional "on its face." Mr. Justice Goldberg observed for the majority:

> "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save

it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it. . . . To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

"The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. . . . [A]n attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage." 378 U.S. at 515-16.

Similarly in the instant cases, the Court should not consider the abstract question of whether Congress might have enacted a valid statute purporting to achieve the public-interest goals of §304 in cases where a debtor railroad's rail operations are sufficiently profitable to produce income before fixed charges, but might not require the same application to a railroad with a massive deficit in income available for fixed charges. Appellees in these cases should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally restricting the right of other railroads to withdraw their property from public service. It is submitted that *Aptheker v. Secretary of State, supra,* is in point, and that the cases cited in USRA's brief (at 66) are not.

E. The Court Below Was Correct in Enjoining USRA from Attempting to Implement §304(f)

The USRA brief (at 66-68) contains an argument which seems to say that an injunction should not have been issued against USRA implementing §304(f) even in the absence of an adequate remedy at law.

Section 304(f) *in haec verba* withdraws the Penn Central Reorganization Court's power, as a court of equity, to protect constitutional rights by ordering a cessation, either full or partial, of rail operations. §601(b) of the RRRA when read in conjunction with §304(f), must be viewed as making inapplicable to debtor railroads subject to the RRRA the power of the reorganization court under §77(o) to authorize abandonments and discontinuances of service pending abandonments being approved by the ICC under §1(18) of the Interstate Commerce Act. Given the purposes of 28 U.S.C. §§2282 and 2284, only a three-judge court constituted as there provided has authority to issue an injunction protecting the plaintiffs from an unconstitutional application of §304(f), and therefore to restore the power of the reorganization court under §77(o). The injunction granted below restores the Penn Central Reorganization Court's equity power to the *status quo ante* the RRRA, and properly leaves to that court, which has the greatest familiarity with the facts, the responsibility to determine whether the point of unconstitutional erosion has happened.

A further ground for not disturbing the injunction against USRA's enforcement of §304(f) is that USRA has not demonstrated that the existence of such injunction will materially impede its planning functions relative to preparation of a final system plan. See *infra* at 109-11.

F. The Court Below Was Correct in Adjudging §303 of the RRRA Void for Failure to Provide Just Compensation for the Interim Takings Mandated by §304

The USRA brief asserts (at 68-72) that the court below misread §303 to preclude the Special Court's providing a constitutional remedy in the event that there is no Tucker Act remedy for the interim takings of Penn Central's and plaintiff's property mandated by §304. The argument is based principally on USRA's prematurity contentions and its argument that §304(f) can be construed narrowly to avoid constitutional issues.[85] The principal element of USRA's argument is its contention that the injunction against implementation of §304(f) will be so successful as to render moot any claim for an interim taking based on the RRRA. The argument proves too much. If the injunction against implementing §304(f) leads to a decision by the Reorganization Court permitting a complete cessation of Penn Central's rail operations and eventual liquidation of those rail properties, there will never be any occasion for a §303(b) conveyance. If, on the other hand, USRA is successful in preventing a decision that would permit discontinuance of all rail operations (the only hypothesis under which §303(c) would be brought into play), then it is still the fact that the RRRA will have caused Penn Central to incur additional erosion for which §303(c) does not provide payment of just compensation in money or its perfect equivalent. The court was required by the posture of the case on motion for summary judgment to decide whether §303(c) provided just compensation for the interim taking, an issue which it found to be ripe for adjudication. Its judgment was correct.

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[85]For rebuttal, see New Haven Trustee's Brief as Cross-Appellant at 24-36; Part II-D, *supra*.

G. The Court Below Was Correct in Enjoining Certification of a Final System Plan Pursuant to §209(c) of the RRRA

Once the court determined that §304(f) of the RRRA mandated an uncompensated interim taking of Penn Central's and plaintiff's property, that the Tucker Act did not provide an adequate remedy at law, and that §303(c) did not permit the Special Court to cure this deficiency, the court was virtually compelled to enjoin certification of a final system plan by USRA to the Special Court pursuant to §209(c) of the RRRA. Section 209(c) is the operative provision which will set into motion the mandatory conveyances and divestment of creditor liens provided in §302(b) of the RRRA. Since the last sentence of §303(b)(2) provides that

> "[s]uch conveyances shall not be restrained or enjoined by any court."

it was necessary for the §2284 court to protect its jurisdiction by an order that will prevent §303(b) from becoming operative.

If §303(c) is adjudged repugnant to the Constitution, it follows as a matter of law that certification pursuant to §209(c) should not be permitted. USRA's argument to the contrary (USRA brief at 73-74) is largely a repetition of arguments previously discussed. The only new element is the contention that USRA *could* devise a final system plan which did in fact compensate the Penn Central estate for the interim taking of its property.

The concise answer to this contention is that the court below, as a court of equity, has inherent jurisdiction to consider the continued necessity for its presently outstanding injunction, and to consider

whether changed circumstances warrant relief therefrom. Thus, if USRA should formulate a final system plan which it claims provides just compensation for the interim takings mandated by the RRRA, it can apply to the §2284 court for an appropriate modification of the injunction based on such a final system plan. The injunction does not prevent a final system plan from being *formulated and submitted to Congress pursuant to §208(a).*[86] If USRA is aggrieved by any future judgment of the §2284 court on the issue of whether the injunction should be modified, it would have a right to appeal to this Court from an order denying modification of the injunction. In short, at this stage of the case, USRA has not made the requisite factual showing that it can surmount the constitutional problem of an uncompensated interim taking. It will be timely to consider that issue after USRA has submitted its final system plan and its evidence in support thereof to the §2284 court.

When, as and if USRA does present to the §2284 court a final system plan under the RRRA, the issue of whether implementation of such a plan will produce an inadequately compensated permanent taking of Penn Central's and plaintiffs' property must then be faced, if they have not been resolved by the Court's judgment on the New Haven Trustee's cross-appeal. At that point, none of the alleged grounds of prematurity cited by the Court below will be present. Thus the injunction against certification of a final sys-

[86]USRA has advised the Special Court that in fact it is seeking a 120-day extension of the time deadlines, plus an increase from $26 million to $40 million in its appropriations. A bill to this effect has been filed by Senator Hartke (S. 4003; see Congressional Record, September 16, 1974, S16619). Thus it would appear that USRA intends to prepare a final system plan for submission to Congress notwithstanding the injunction against such a plan being certified to the Special Court.

tem plan pursuant to §209(c) is a necessary protection to assure compliance with applicable Fifth Amendment principles, both as respects the interim taking issue and the permanent taking issue. USRA's argument to the contrary erroneously assumes that the court would have found, had it reached the issue, that the compulsory conveyance provisions of the RRRA are valid constitutionally. No such assumption is justified, particularly in light of Judge Fullam's concurring opinion below (JA 55-81), and his opinion in support of Order No. 1596 (JA 124-51). As Judge Fullam observed in the latter opinion:

> "I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two." (JA 146).

H. The Court Below Was Correct in Concluding That Erosion of the Penn Central Estate Has Been Substantial and Is Continuing During the Planning Processes of the RRRA

USRA's brief (at 75-82) and the United States' brief (Appendix, at 59-73) argue that the court below should not have found, on the record in this case, that erosion of the Penn Central estate has occurred or is continuing during the planning process of the RRRA. The Court should summarily dispose of this contention, and the Governmental Appellants' related arguments concerning what "erosion" is, how it is calculated, and when it becomes unconstitutional to require a debtor railroad's estate to continue to bear it, by reference to the findings of fact of the Penn Central Reorganization Court in its May 2, 1974 Opinion in Support of Order No. 1543 (JA 84-102).[87]

Judge Fullam's findings of fact in support of the "120-day" decision under the first sentence of §207(b) of the RRRA included the following:

> "1. During the period from the filing of the Debtor's reorganization petition on June 21, 1970, to December 31, 1973, the Debtor's operations have produced losses in ordinary income, calculated in accordance with ICC regulations (49 C.F.R. Part 1201, 501-51) totalling $851.1 million.
>
> "2. The Debtor has been able to continue operations during this period only by deferring payments of virtually all real estate taxes, rentals of

[87]The United States participated in the proceedings upon which Opinion and Order No. 1543 were based, and urged the ultimate conclusion reached by Judge Fullam, that Penn Central was not reorganizable on an income basis. The United States did not appeal from Order 1543, and in their appeals from Order No. 1596 ("180-day" findings under §207(b) of the RRRA), neither the United States nor USRA complained of any of the factual findings set forth in Opinion and Order No. 1543.

leased lines, and interest (including mortgage and collateral trust bonds) other than equipment obligations.

"3. Non-recurring income [sic] aggregating $155.3 million from trustees certificates, sales of real property and equipment, sales of securities, and drawdowns from escrowed funds, have been utilized to sustain operations." (JA 89).[88]

* * *

"18. Below is the forecasted income statement for the Debtor premised on the traffic and revenue forecast with certain assumptions for cost increases.

	1974	1975	1976	1977	1978
	(dollars in millions)				
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,309.7	2,491.6	2,651.6	2,815.7	3,001.7
Net Rwy. Oper. Inc.	(141.2)	(118.4)	(71.4)	(40.2)	(4.4)
Other Income	62.2	74.2	82.0	88.5	90.4
Misc. Deductions	21.2	20.2	20.2	20.2	20.2
Inc. Avail for Fx. Chgs	(100.2)	(64.4)	(9.6)	28.1	65.8
Fixed Charges	137.5	131.9	126.4	124.1	122.0
Ordinary Income	$ (237.7)	$ (196.3)	$ (136.0)	$ (96.0)	$ (56.2)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons handled (Mil.)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (%)	82.99	81.16	79.49	78.51	77.45"

(JA 94-95).

* * *

"24. In order to depict the financial results of the Debtor's rail operations only, the income statement shown in Finding 18 was adjusted as follows:

"a. Non-rail income, including accruals of tax allocation payments due from related companies, is extracted from the statement.

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[88]The reference to non-recurring *income* is presumably meant to refer to non-recurring sources of cash, since borrowings on Trustees' Certificates do not represent income at all, and the remaining items represent only in part non-recurring income.

"b. Due to the lack of definitive information, an arbitrary allocation of 50% of the leased line rents and interest obligations (components of fixed charges) have been extracted from the statement.

"c. Tax accruals have been adjusted according to a preliminary analysis developed by the Trustees' staff of the tax consequences of severance of rail and non-rail operations.

"d. The rail operation is presumed to carry the full cost of overhead." (JA 98).

"25. Set out below is the forecasted income statement based on the procedure set out in Finding 24 for the Debtor's rail operations only.

	1974	1975	1976	1977	1978
	(dollars in millions)				
Operating Revenues					
Freight	$1,879.2	$2,069.3	$2,258.2	$2,435.5	$2,637.3
All Other	289.3	303.9	322.0	340.0	360.0
Total	2,168.5	2,373.2	2,580.2	2,775.5	2,997.3
Operating Costs	2,314.3	2,496.1	2,656.1	2,820.1	3,006.0
Net Rwy. Oper. Inc.	(145.8)	(122.9)	(75.9)	(44.6)	(8.7)
Other Income	5.6	5.6	5.6	5.6	5.6
Misc. Deductions	13.0	10.9	10.9	10.9	10.9
Inc. Avail for Fx. Chgs.	(153.2)	(128.2)	(81.2)	(49.9)	(14.0)
Fixed Charges	83.5	78.2	72.7	70.4	68.3
Ordinary Income	$ (236.7)	$ (206.4)	$ (153.9)	$ (120.3)	$ (82.3)
Average Number of Employees	79,325	79,325	79,325	79,325	79,325
Tons Handled (Millions)	282.1	293.8	305.3	316.0	327.9
Operating Ratio (Percent)	82.99	81.16	79.49	78.51	77.45"

(JA 98-99).

Based on unchallenged facts, operation by Penn Central of its railroad during 1974 and 1975 can be expected to result in *negative* income available for fixed charges of $153.2 million and $128.2 million, respectively, or a total in excess of $280 million for these two years *before* even consideration of continuing accrued interest on debt in default and unpaid lease line rentals, each of which may be a priority administration expense. Interest is a priority administration expense if the underlying debt is fully secured. Unpaid leased

line rentals are administration expenses pending a decision to affirm or reject the underlying leases; if any lease is rejected by the Trustees, the lessor will have an administration claim for the reasonable rental value of its properties for the period preceding rejection.[89] If all fixed charges were to constitute administration expenses, the total erosion of the estate during the years 1974 and 1975, measured by the income statement, would exceed $440 million.

The New Haven Trustee does not assert that income statement losses, as such, necessarily establish that erosion is occurring, or the precise amount of that erosion. On the other hand, *negative* income available for fixed charges of the magnitude here existing is strongly indicative of massive erosion from deficit rail operations unless it can be shown that some of the amounts deducted in the computation of income available for fixed charges have in fact been the source of incremental capitalized value to the estate.

The United States and USRA have presented an analysis which is flawed by numerous fallacies in their attempt to downgrade the substantial evidence of erosion of the Penn Central estate.[90] For example, they at-

[89]The Government seems to assume that, following rejection of a lease, the effect of §77(c)(6) would entitle Penn Central to claim that operations were for the account of the lessor relating back to June 21, 1970; §77(c)(6) operates prospectively only.

[90]No attempt will be made to itemize all of the Government's fallacies; however, as an example, the assertion that net book value of freight equipment and road properties has *increased* $89 million (United States' brief at 68) is wholly inaccurate. At Dec. 31, 1970, Penn Central's balance sheet showed road and equipment property of $2,889,799,000, after depreciation and amortization; at Dec. 31, 1973, the figure was $2,618,390,000, a *reduction* of $271,409,000. Form R-1 Report, Schedule 200A (comparative 1970 figures, Form A Report). This error, which is of the magnitude of $360 million, is indicative of the unreliability of the figures set forth in the Appendix to the United States' brief. Other fallacious numbers are noted in succeeding footnotes. The reduction in the book value, net of depreciation, of Penn Central's physical assets can be broken down as follows: road properties, from $1,409,192,000 at Dec. 31, 1970, to $1,354,319,000 at Dec. 31, 1973, a reduction of

(footnote continued on next page)

tack the accounting concept of depreciation at a time when, by reason of inflation, there is substantial doubt as to whether book depreciation based on historical cost is enough to reflect replacement cost when the capital asset must be junked and replaced at a highly inflated price in order to keep the railroad operational.[91] They also attack the ICC's accounting prac-

(footnote continued from preceding page)

$54,873,000; rail equipment, from $1,208,465,000 at Dec. 31, 1970 to $973,133,000 at Dec. 31, 1973, a reduction of $235,332,000. Form R-1 Report, Schedules 200A, 211D. The decline in rail equipment can be further broken down in terms of gross book value; locomotives declined from $404,618,000 to $327,356,000; freight cars from $1,098,289,960 to $994,833,000; passenger cars from $118,131,860 to $56,543,000. Penn Central received no cash proceeds from its initial sale of locomotives and passenger cars to Amtrak; the purchase price for such equipment was offset by Penn Central's obligation to invest in the common stock of Amtrak. At Dec. 31, 1973 Penn Central's balance sheet showed $52,382,000 invested in Amtrak common stock, an investment which is non-marketable and of questionable value. Form R-1 Report, Schedule 206.

[91]During 1973, Penn Central's total depreciation and amortization charge was $88,989,000, of which $54,348,000 was equipment depreciation and $29,877,000 was road depreciation (Form R-1 Report, Schedules 322, 330, and 397). The book value of equipment retired during 1973 was $97,806,000, of which $74,307,000 was charged to the depreciation account. (Form R-1 Report, Schedule 397). Thus retirements of rail equipment exceeded the total charge to income in respect of depreciation and amortization. New investment in transportation property totaled only $21,091,000. *Id.* Equipment obligations of $47,285,000 were paid, which is substantially less than the book value of equipment retired. *Id.* Only $1,487,000 of new equipment obligations were issued, because Penn Central is unable to sell equipment trust certificates and must resort to leasing its replacement rail cars and locomotives. A total of 21 new freight cars was purchased; 1,329 freight cars were leased; 9,973 freight cars were retired from service. Form R-1 Report, Schedule 417. The assertion of the United States that $206.5 million paid on maturing instalments of equipment debt had the effect of "increasing the estate's equity in readily saleable railroad equipment" (United States brief, at 66) is wholly fallacious because it ignores the fact of *retirement* of old and obsolete equipment. In addition to retirements of $97.8 million in 1973, there were retirements of $133.4 million in 1972. (1972 Form A, Schedule 397). (Schedule 397 does not appear in the Form A Report for 1971). Retirement of rail equipment in 1972 and 1973 thus more than offset the entire amount paid on maturing equipment obligations in four years since Penn Central filed its §77 petition. Since book value of rail equipment owned by Penn Central has declined by $235 million in the 3 years ended December 31, 1973, it would appear that payments on related debt of $206.5 million (assuming that is a correct figure) did not increase the estate's equity in railroad equipment at all.

tice of requiring that the costs of maintenance of way and maintenance of equipment be accounted as a current cost rather than treated as a capital asset, at a time when inadequate expenditures on maintenance of way (aggravated by inflation which reduces the number of units of work performed for a given expenditure) have rendered a substantial portion of the Penn Central system unsafe even for freight train operations at 10 miles per hour.[92]

The short answer to the Governmental Appellants' contentions about erosion is that it is not necessary for a court to define erosion with mathematical precision in order to ascertain whether or not the estate is steadily becoming less valuable after deduction of priority administration claims. Even if, *arguendo*, appreciation of balance sheet assets were legally an offset to erosion caused by rail operations producing negative income available for fixed charges (a point which is strongly contested by Appellees), there is no evidence which establishes that Penn Central's balance sheet assets (either rail or non-rail) have appreciated since 1970, or are likely to appreciate in 1974 and 1975, in any material amount, much less an amount sufficient to offset the negative income available for fixed charges. Moreover, the Fifth Amendment guarantees that a reg-

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[92]During 1973, Penn Central expended $13,539,000 in replacement ties, and $13,238,000 in replacement rail; but expended only $134,000 in ties and $303,000 in rail on new lines and extensions. Form R-1 Report, Schedules 513-16. 95,581 tons of replacement rail were laid, but 113,135 tons of rail were taken up and scrapped. *Id.* The United States' figure of $358 million allegedly spent for track replacement (United States' brief, at 68) apparently covers more than the cost of ties and rail; this figure cannot be reconciled even with expenditures, including labor, in all forms of maintenance of way. In 1973, Penn Central's total expense for maintenance of way and structures was $226,082,000, exclusive of depreciation. Form R–1 Report, Schedule 320. The Penn Central Trustees have stated that this amount is insufficient to keep pace with the rapid deterioration of the roadbed. See Trustees' Reports, J.D.S. 8,9 and 10.

ulated public utility should not only not operate at a *loss*, but should earn a return on its investment, or at the very least an amount sufficient to offset accruing interest and leased line rentals, that is to say, the cost of capital devoted to the enterprise.[93]

The court below was entitled to give weight to Judge Fullam's findings of fact, from which a finding of substantial erosion of the Penn Central estate is plainly warranted. Since the Government offered no evidence establishing that there has been any appreciation of Penn Central's balance sheet assets, the court below was not even required to reach the legal issue of whether such hypothetical appreciation, particularly as to non-rail assets, is an offset to erosion.[94]

The court properly found that the erosion of the Penn Central estate during four years of §77 operations has been substantial, and that such erosion is continuing. This is the only finding necessary to sustain its judgment that the RRRA is unconstitutional insofar as it requires private property to be devoted to a public use without just compensation.

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[93]See *Federal Power Commission v. Hope Natural Gas Co., supra.*

[94]The assertion in the United States' brief (at 69) that Pennsylvania Co. has increased in value by $53 to $100 million has no factual foundation and is based on an argumentative view of evidence adduced during proceedings relative to a proposed settlement agreement under which the Pennsylvania Co. stock would have been exchanged for the debt which it presently secures. As Judge Fullam observed in *In re Penn Central Transportation Co. (Order No. 1189)*, 358 F. Supp. 154, 183 (E.D. Pa. 1973), declining to approve such settlement agreement, "... the inescapable truth is that no one really knows how much the Common Stock of Pennco is worth; the best that can be hoped for is an educated guess within a fairly wide range."

CONCLUSION

For the reasons stated, those portions of the Order below dated June 25, 1974:

which enjoin defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA;

which enjoin defendants from taking any action to enforce §304(f) of the RRRA; and

which adjudicated that §303, §304(f) and a portion of §207(b) are unconstitutional;

should be affirmed in all respects.

The New Haven Trustee has set forth the grounds upon which the Order below should be reversed and remanded in his brief, as Cross-Appellant, dated August 28, 1974.

September 26, 1974

Respectfully submitted,

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APPENDIX

LETTER DATED NOVEMBER 14, 1973 FROM SECRETARY OF TRANSPORTATION BRINEGAR TO SENATORS MAGNUSON AND COTTON, REPRINTED IN SENATE REPORT NO. 93-601, 93rd CONG., 1st Sess. (1973)

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., November 14, 1973.

HON. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce,
Washington, D.C.

HON. NORRIS COTTON,
Ranking Minority Member, Senate Committee on Commerce,
Washington, D.C.

[Text of letter reproduced at JA 214-220]

[The following memorandum was attached to the letter]

DEPARTMENT OF TRANSPORTATION

MEMORANDUM

If the rail assets of the bankrupt railroads were to be acquired by FRC[95] by means of condemnation, the following unfavorable consequences would result:

1. The price would be higher.

If they were transferring their rail assets to another railroad as part of a reorganization, the bankrupt estates would be entitled to "the estimated market value that would be realized in a total liquidation, less the

[95] "FRC" refers to "Federal Rail Corporation," the original name of Consolidated Rail Corporation in Senate Working Paper No. 1.

cost of dismantling properties and other liquidation costs and after discounting proceeds to present worth." *New Haven Inclusion Cases*, 399 U.S. 392, 436 (1970). These deductions from market value could not be made in a condemnation. In condemnation, "the owner is entitled to the fair market value of the property at the time of the taking." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); accord, *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 123 (1938); *Olsen v. United States*, 292 U.S. 246, 255 (1934).

2. The payment would have to be in cash.

In a plan of reorganization, creditors normally have their claims satisfied with securities. In a condemnation, however, the Supreme Court has repeatedly stated that compensation must be "paid in money". *Olsen v. United States*, 292 U.S. 246, 255 (1934); accord, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1970); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller* , 317 U.S. 369, 373 (1943). As was stated by Justice Paterson in *Vanhorne's Lessee v. Dorrance*, 2 U.S. 303 (C.C. Pa. 1795), at 315:

> "No just compensation can be made except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to universal variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it

cannot be forced upon him. His consent will legislate the act, and make it valid; nothing short of it will have the effect."

3. Even if the stock of FRC could be used for payment, it would have to be valued at present market value.

As stated in point 1, *supra*, the rule in condemnation is that property must be valued as of the date of the taking. Thus, even if cash payment were not required, the FRC stock would have to be valued at its current market value. Before FRC begins to operate and has an opportunity to demonstrate its earning potential, its stock may have a depressed value in the marketplace. However, in a reorganization under section 77 of the Bankruptcy Act, it is well settled that the earning power of the railroad is the chief criterion of value. 5 COLLIER ON BANKRUPTCY ¶77.18 at 550 (14th ed. 1972); see the last paragraph of section 77(e). Thus, a capitalization of FRC's projected earnings over a reasonable period of time would be the method for valuing FRC's common stock in such a proceeding.

[The following text was enclosed with the letter and memorandum]

PROPOSED AMENDMENTS TO SENATE COMMERCE COMMITTEE WORKING PAPER NO. 1

P. 6, delete lines 5-12, and substitute:

"(6) 'Fair and equitable compensation' means a payment in money or property having a value which would have been required to be paid had the rail properties been conveyed to another railroad pursuant to a plan of reorganization under section 77 of the Bankruptcy Act (11 U.S.C. 205).

"(7) 'Fair liquidation value' means the best price that the market could have fairly been expected to provide as of December 31, 1973, for the sale of such rail properties over a reasonable period of time less the economic costs and expenses incident to holding and maintaining such properties over such time and to their disposition and less a reasonable discount for delay in receipt of proceeds over such time."

Renumber the succeeding paragraphs of section 103.

P. 6, line 21, insert after "service" the words: "or any interest in or rights to use such property".

P. 25, line 5, delete "of" and substitute "operated by".

P. 25, delete everything after "region" on line 6 down through "which" on line 8.

P. 25, line 9, replace the comma after "Corporation" with a semicolon and delete everything thereafter down through the end of line 11.

P. 25, line 18, insert "or leased" after "purchased".

P. 26, insert the following between lines 1 and 2:

"The final system plan may provide for purchase by the Corporation of rail properties of a profitable railroad, and may require any profitable railroad designated to purchase or sell rail properties to obligate itself to be bound by any order of the special court entered under section 303 of this Act which changes the compensation to be paid for the rail properties."

P. 26, delete lines 9 through 16, and insert:

"(d). Transfers.—All transfers pursuant to the final system plan shall be made in accordance with and subject to the following principles:"

P. 26, line 17, delete "conveyed" and substitute "transferred".

P. 26, delete everything after "for" on line 21 down through the end of line 23 and substitute:

"all of the common stock of the Corporation. The final system plan shall allocate the percentage of the Corporation's common stock to be given to each railroad in reorganization in proportion to the rail properties conveyed to the Corporation by each railroad in reorganization".

P. 27, delete everything after "conveyed" on line 1 down through the end of line 2 and substitute "for fair and equitable compensation."

P. 27, insert the following between lines 2 and 3:

"(3) All rail properties to be conveyed to the Corporation by a profitable railroad shall be conveyed pursuant to terms agreed upon between the Association and that profitable railroad."

P. 27, line 3, change "(3)" to "(4)".

P. 28, line 6, delete "JUST" and "VALUE".

P. 28, delete everything after "designate" on line 7 down through the end of line 15, and substitute:

"the fair liquidation value of all rail properties of a railroad in reorganization to be transferred to the Corporation under the final system plan, and the value of the consideration to be paid by the Corporation in exchange for the properties; the fair and equitable compensation to be paid by a profitable railroad for rail properties of a railroad in reorganization that are to be conveyed to the profitable railroad under the final system plan; and the consideration to be paid by the Corporation for any rail properties of a profitable railroad to be purchased under the final system plan."

P. 28, line 8, delete "conveyed" and substitute "transferred".

P. 32, line 4, delete "1 year" and substitute "180 days".

P. 32, line 13, delete "the one that is most".

P. 32, line 22, after "court", insert "shall have all the powers of a reorganization court in proceedings under section 77 of the Bankruptcy Act and".

P. 33, line 4, delete "90 days, but not earlier than 75" and substitute "15".

P. 33, line 6, delete everything after the word "plan" down through the end of line 18 on p. 35 and substitue "to the special court, together with a petition seeking the court's approval pursuant to section 303(a) of this Act."

P. 46, delete everything on line 12 down through the end of line 10 on p. 50 and substitute the following:

"PROCEEDINGS BEFORE SPECIAL COURT[96]

"SEC. 303.(a) APPROVAL OF TRANSFERS UNDER PLAN—As soon as is possible after submission of the final system plan to it, the special court, after hearings, shall decide whether or not to approve the transfers of rail properties and the compensation therefor provided for in the final system plan. In making that decision with respect to each railroad in reorganization, the court shall consider—

(1) whether the transfers are fair and equitable to the debtor's estate; and

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[96]Compare this section of the Department of Transportation draft of Nov. 14, 1973 with §§207(b), 303(b), 303(c) and 303(d) of the RRRA.

(2) the interest of the public in the continuation of rail service over the rail properties proposed for transfer under the final system plan.

If the court finds that it cannot approve any of the transfers provided for in the final system plan because the common stock of the Corporation has not been fairly allocated among the railroads in reorganization transferring rail properties to the Corporation, it shall reallocate the stock in a manner which is fair and equitable. If the court finds that a transfer of rail properties of a railroad in reorganization for common stock of the Corporation would not be fair and equitable to the estate of a railroad in reorganization, even with the stock fairly allocated, it shall amend the final system plan to provide for the transfer to that railroad in reorganization in addition to its allocated amount of the common stock of the Corporation, obligations of the Association in an amount which, together with the stock, make the transaction fair and equitable to the estate of that railroad. If the court finds that a transfer of rail properties of a railroad in reorganization to a profitable railroad would not be for fair and equitable compensation, it shall determine what fair and equitable compensation would be and order that such compensation be paid.[97] If there is no way that the court can make a finding that the proposed transfers of rail properties from a railroad in reorganization to the Corporation are fair and equitable to the estate of a railroad in reorganization, then the court shall disapprove the final system plan with respect to that railroad and remand the case to its reorganization court for further proceedings under section 77 of the Bankruptcy Act.[98] If the court approves the fi-

[97]Compare this sentence to the limited discretion afforded to the Special Court by §303(c)(2) of the RRRA.

[98]Compare this sentence with the lack of any remedy in §303(c) of the RRRA in the event that, after the conveyances, the Special Court finds that the consideration specified does not provide fairness and equity.

nal system plan with respect to a railroad in reorganization, it shall order the parties to make the conveyances as provided for in the final system plan, as it may have been amended by the court. Proceedings under this section shall take precedence over all other matters assigned to the judges of the special court, shall be assigned for hearings at the earliest practicable date and shall be expedited in every way possible.

"(b) APPEALS—A finding or determination entered pursuant to subsection (a) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, that such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall grant the highest priority to the determination of any such appeals. Notwithstanding the filing of an appeal under this subsection, the special court may refuse to stay the execution of its orders issued under subsection (a) of this section.

"(c) COURT REVIEW OF ACTIONS—Except as provided in section 209(a) of this Act and in this section, action or inaction under this Act of the Secretary, the Commission, the Association or any director, member, officer, committee, or subordinate unit of any of them, shall not be reviewable in any court."

P. 50, line 14, delete "in the region" and substitute "which transfers to the Corporation and/or profitable railroads all or substantially all of its rail properties designated for such transfer in the final system plan, as approved with or without amendment by the special court under section 303 of this Act, and rail service on

rail properties of a profitable railroad in the region which transfers most of its rail properties to the Corporation pursuant to the final system plan, as approved with or without amendment by the special court under Section 303 of this Act,"

QUORUM OF FNRA BOARD

Amendment To Section 201(f) Of Working Paper No. 1 Dated November 11, 1973.

P. 11, lines 9-10, delete "Four members of such Board, excluding Government members," and substitue "6 members of such Board, including 3 of the Government members,"

QUALIFICATIONS OF OFFICERS OF THE ASSOCIATION

Amendment to section 202(a)(5) of Working Paper No. 1 dated November 11, 1973.

P. 13, line 17, insert after "railroad" the words:

"other than a vested right to receive present or future payments on retirement or pension benefits on deferred compensation for prior service".

LOAN GUARANTEE AUTHORITY

Amendments to section 310 of Working Paper No. 1 Dated November 11, 1973

P. 36, delete lines 15 through 18 and substitute:

"(c) *Guarantee.*—The Secretary is authorized on such terms and conditions as he may prescribe, to guarantee any lender against loss of principal and interest on obligations issued by the Association under this section."

P. 37, delete everything on line 3 down through "prescribe". on line 9 and substitute:

"(e) *Authorization to Issue Obligations to the Secretary of the Treasury.*—If at any time the moneys available to the Secretary are insufficient to enable him to discharge his responsibilities under subsection (c) of this section, he shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury."[99]

[99]Compare this section, with its open-ended authorization to the Secretary of Transportation to acquire necessary funds from the Secretary of the Treasury, with §§210, 213(b), 214 and 215 of the RRRA.